86-776

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

U S WEST, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5118

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
BELL ATLANTIC CORPORATION,
Appellant.

No. 86-5163

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
PACIFIC TELESIS GROUP,
Appellant.

No. 86-5164

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
US WEST, INC.,
Appellant.

Argued May 16, 1986

Decided Aug. 15, 1986

Before MIKVA, SCALIA and BUCKLEY, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

This case presents a number of questions arising from the 1982 antitrust consent decree under which American Telephone and Telegraph Company ("AT & T") was divested of the Bell operating companies ("BOCs")—the twenty-two AT & T subsidiaries engaged in the business of providing local telephone service. The consent decree provided for the creation of seven regional holding companies ("RHCs") to own and operate the BOCs,[1] and it subjected the BOCs to stringent line-of-business restrictions. The district court has been asked on a number of occasions to interpret the scope of these restrictions, and in this case three of the RHCs challenge one such interpretation.

Appellant US West asks us to hold that the restrictions of the consent decree are not binding on the RHCs because they were not parties to it. Appellants US West, Bell Atlantic, and Pacific Telesis dispute the district court's finding that the consent decree prohibits the RHCs from providing "exchange telecommunications services," including two-way mobile telephone and one-way paging services, outside of their respective geographic regions. Bell Atlantic also appeals a subsequent order requiring it to discontinue the extraregional activities of its paging service subsidiary. Finally, US West appeals the district court's denial of a request by Ameritech for authorization to provide "shared tenant services," which would allow tenants of a building to use

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[1] The seven RHCs are American Information Technologies Corp. ("Ameritech"), Bell Atlantic Corp., BellSouth Corp., NYNEX Corp., Pacific Telesis Group, Inc., Southwestern Bell Corp., and US West, Inc.

centralized facilities to route long distance calls in accordance with predetermined cost and traffic analysis criteria.

We hold that the RHCs are bound by the consent decree, that the decree does not prevent the RHCs from providing exchange services outside their geographic regions, and that the district court therefore erred in ordering the RHCs to stop providing extraregional exchange services. We do not reach the merits of the shared tenant services issue because Ameritech did not appeal the district court's denial of its request for a ruling that the decree permitted such services, and US West is without standing to obtain review of the district court's decision.

I. Factual Background

The January 1, 1984 breakup of the Bell System stems indirectly from an antitrust action brought against AT & T by the Justice Department in 1949. This action led to the entry of a consent decree in 1956 that prohibited AT & T from conducting any business unrelated to providing common carrier communications services. In 1974 the government brought a second antitrust action alleging that AT & T had used its monopoly (or "bottleneck") control over local telephone service to the disadvantage of competitors in the long distance and telecommunications equipment markets. While this action was being tried in the district court, the parties announced an agreement by which they proposed to settle the case. *See generally United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 135-40 (D.D.C. 1982), *aff'd mem. sub nom., Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

The proposed consent decree split the Bell System into two basic parts—the competitive portion of the business, which would provide long distance service, manufacture telecommunications equipment, and conduct research, and the noncompetitive portion of the business, which would

continue to have bottleneck control of local telecommunications service. The competitive portion was to be retained by AT & T and its Western Electric and Bell Labs subsidiaries, while the noncompetitive portion was assigned to the RHCs and their BOC subsidiaries. The distinction between the two portions of the business was to be preserved by creating "exchange areas," generally centering on a metropolitan area, within which BOCs would provide "exchange telecommunications services" consisting principally of local telephone service. The right to provide long distance "interexchange telecommunications services" was reserved to AT & T and its non-Bell System competitors. *See generally id.* at 140-43.

In accordance with the provisions of the Tunney Act, 15 U.S.C. § 16(b)-(h), the district court conducted public proceedings to determine whether the proposed consent decree was in the public interest. As a result of these proceedings, the district court made a number of relatively minor changes in the proposed decree and authorized its implementation. *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. at 225. The divestiture formally took place on January 1, 1984, when ownership of the twenty-two BOCs was transferred to the seven RHCs, and the stock of the RHCs was distributed to AT & T's shareholders.

This case involves the extent to which the RHCs and BOCs are prohibited by the consent decree from engaging in certain business activities. The principal business restrictions on the BOCs are set forth in section II(D) of the consent decree, which provides that:

> After completion of the reorganization . . . no BOC shall, directly or through any affiliated enterprise:
>
> 1. provide interexchange telecommunications services or information services;
>
> 2. manufacture or provide telecommunications products or customer premises equipment (except for

provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.[2]

This provision is subject to section VIII(C) of the decree, which states:

The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

Because of uncertainty over whether certain proposed business ventures were permissible under section II(D), such that no waiver under section VIII(C) would be necessary to engage in them, several RHCs filed motions for clarification with the district court.[3] In a decision

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[2] The final consent decree is appended to the district court decision in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131, 226-34 (D.D.C. 1982).

[3] Ameritech filed motions requesting that the decree be interpreted to permit the RHCs to provide, *inter alia*, cellular radio services, including paging and mobile telephone services, outside of their geographic regions and shared tenant services to long distance users within their regions. US West similarly asked for a ruling that it could provide cellular radio services outside of its region. US West's district court brief supported Ameritech's motion with respect to shared tenant services, but US West did not join in that motion. Pacific Telesis asked that the decree be interpreted to permit it to provide exchange telecommunications services, including paging and mobile telephone services, outside of its region. Bell Atlantic filed a brief in support of Pacific Telesis' motion, but did not join that motion. *See United States v. Western Electric Co.*, 627 F. Supp. 1090, 1093 n.1 (D.D.C. 1986).

dated January 13, 1986, the district court denied all of the motions. *See United States v. Western Electric Co.*, 627 F. Supp. 1090 (D.D.C. 1986).

Two district court determinations are pertinent to this appeal. First, the court held that RHCs may not provide two-way mobile telephone and one-way paging services outside of their geographic regions absent a section VIII(C) waiver. The court reasoned that such services are "exchange telecommunications services" under the consent decree and that the decree implicitly prohibits the RHCs from providing exchange services outside of their geographic regions. Second, the court ruled that the decree prohibits the RHCs from selling certain "shared tenant services" within their regions. Sales of such services essentially involve bulk purchase of long distance service from interexchange carriers and discount resale of this service to groups of office building tenants. The proposal before the court did not involve sale of a complete package of shared tenant services. Rather, Ameritech proposed to sell such elements of shared tenant service as "least-cost routing," which involves programming a switch to select interexchange carriers in accordance with customers' wishes, and "traffic analysis," which involves studying customers' long distance usage patterns in order to facilitate routing at the lowest cost. The court explained that such services constitute "interexchange telecommunications services," which the BOCs are prohibited from offering under section II(D) of the consent decree.

In an order dated February 14, 1986, the district court noted that Pacific Telesis, Southwestern Bell, and Bell Atlantic were providing mobile telephone and paging services outside of their regions and reviewed the plans that the three companies had submitted for complying with the court's January 13 decision. Pacific Telesis and Southwestern Bell had both pledged to discontinue all extraregional exchange services within ninety days, and

the court agreed to grant these companies until April 17, 1986 to terminate their extraregional operations. Bell Atlantic had promised to discontinue the extraregional mobile telephone operations of its A Beeper Company subsidiary, but it asked for permission to continue providing extraregional paging services pending Justice Department review of its petition for a waiver under section VIII(C) of the consent decree authorizing it to remain in that business. The court denied this request and ordered Bell Atlantic to stop providing exchange services outside of its region by April 17, 1986. This order was subsequently stayed pending appeal of the court's January 13 and February 14 orders.

On February 26 the district court granted a waiver to Pacific Telesis authorizing it to provide certain extraregional paging and mobile telephone services. A waiver was also granted to NYNEX on March 13, permitting it to provide mobile telephone service outside of its region. On May 14 the district court granted a waiver to Bell Atlantic, authorizing its A Beeper Company subsidiary to provide extraregional paging services. This waiver, however, is subject to the limitation that A Beeper not market paging services actually provided by other RHCs and their BOC subsidiaries. Because much of A Beeper's extraregional business consists of marketing services provided by other RHCs, Bell Atlantic has continued to express dissatisfaction with the district court's decisions.

In this appeal, US West, Bell Atlantic, and Pacific Telesis seek reversal of the district court's January 13 decision insofar as it prohibits the RHCs from providing extraregional exchange services without prior court approval. Bell Atlantic also appeals the court's February 14 order limiting the operations of its A Beeper Company subsidiary. In addition, US West appeals the portion of the January 13 decision that denies Ameritech's request for authorization to provide shared tenant services. The court's subsequent orders granting waivers to Pacific

Telesis, NYNEX, and Bell Atlantic are not directly at issue in this appeal.

II. Discussion

A. *Applicability of the Consent Decree to the RHCs*

Alone among the RHCs, US West argues that the consent decree does not bind the RHCs. US West advances two lines of analysis, either one of which it contends compels the conclusion that the RHCs are free to provide the services at issue in this case. First, it claims that application of the consent decree's restrictions to the RHCs and BOCs offends due process because the RHCs and BOCs were not parties to the underlying antitrust proceeding, did not have independent legal representation, and never actually consented to the decree. Second, it asserts that even if application of the decree to the RHCs and BOCs does not offend due process, the RHCs are nonetheless free from the decree's restrictions because the literal terms of the decree limit only the activities of the BOCs and do not purport to constrain the RHCs. We find neither of these arguments persuasive and hold that the RHCs and BOCs are subject to the restrictions of the consent decree.[4]

US West's due process argument fails because it ignores the facts that AT & T was a party to the antitrust proceeding and both the RHCs and the BOCs were wholly owned subsidiaries of AT & T at the time the consent

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[4] The government suggests that we need not reach the merits of this issue because it was not raised by US West in the district court. However, US West did express doubts as to the decree's applicability to the RHCs, Reply Comments of US West to Ameritech's Motion Regarding Shared Tenant Services at 2 n.2, and the district court felt compelled to respond to US West's contention. *United States v. Western Electric Co.*, 627 F. Supp. at 1093 n.2. Under these circumstances, our usual reluctance to reach issues not raised in the district court does not prevent us from considering this issue. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984).

decree was entered. This intimate corporate affiliation distinguishes the instant case from *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604 (1961), and *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), cited by US West, which held only that class members not adequately represented by class representatives may not be bound by judgments entered against the class. US West also cites *Federal Trade Commission v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980), which establishes that a company being acquired by another company may be entitled to independent legal representation. US West cites no authority, however, for the remarkable proposition that a parent may not bind its wholly owned subsidiaries without affording them independent legal representation. It is self-evident that due process does not require such representation. Because the RHCs and BOCs were AT & T's privies in the antitrust proceeding, the consent decree is binding on the former AT & T subsidiaries even though they were not parties to the action. *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir. 1984).

US West's related suggestion that AT & T breached a fiduciary duty owed to the RHCs and BOCs by consenting to onerous restrictions on its former subsidiaries is both specious and irrelevant. It is specious because the only duty owed by AT & T was to its shareholders, who were identical to the initial RHC shareholders. Even if US West is correct in asserting that AT & T agreed to restrictions on the RHCs and BOCs in order to free itself of restrictions, there was nevertheless no injury to the shareholders. AT & T was merely allocating Bell System assets and liabilities among different portions of the business in anticipation of divestiture. US West's fiduciary duty argument is irrelevant because even if US West could show that AT & T breached such a duty, this would at most demonstrate that the RHCs have a cause of action against AT & T. It would not follow

that the RHCs are entitled to judicial relief from the obligations of the consent decree.

US West's contention that the RHCs are not restricted under the literal terms of the consent decree also fails upon close examination of the decree. At least three provisions of the decree make clear that the RHCs, as well as the BOCs, are subject to the consent decree's line-of-business restrictions. First, section III of the decree states "[t]he provisions of this [decree], applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns . . . ." Section IV(a) defines "affiliate" to include "any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned or controlled by another affiliate." As the district court explained in its January 13 decision, because the RHCs were wholly owned subsidiaries at AT & T prior to the divestiture, they are "affiliates" within the meaning of section IV(A) and therefore are bound under section III of the decree. *United States v. Western Electric Co.*, 627 F.Supp. at 1093 n. 2.

Second, section IV(C) defines the term "BOC" to include "any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership." Because the shareholders of the RHCs directly own the RHCs and indirectly own the BOCs, the RHCs and BOCs are "affiliated through substantial common ownership." *See Braun v. Insurance Co. of North America*, 488 F.2d 1066, 1067 (5th Cir.1974).

Finally, in setting forth the consent decree's line-of-business restrictions, section II(D) states that "no BOC shall, directly or through any affiliated enterprise [engage in conduct proscribed by the decree]." For the reasons stated above, the RHCs are affiliated with their sub-

sidiary BOCs, and the RHCs are accordingly subject to the restrictions of section II(D).

We are not troubled by US West's observation that the decree's expansive definition of a BOC results in broad application of the decree's restrictions to RHCs and other companies affiliated with BOCs. This result is consistent with the decree's objective of sharply limiting the ability of businesses with bottleneck control of local telephone service to utilize their monopoly advantages to affect competition in competitive markets. *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. at 142. It is also consistent with the Supreme Court's recent recognition that, under the antitrust laws, corporations and their wholly owned subsidiaries function as a single enterprise. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). Moreover, the impact of the decree's restrictions on companies affiliated with BOCs is mitigated by section VIII(C), the decree's waiver provision, which requires that BOCs be granted the right to engage in activities otherwise proscribed "upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter."

B. *Extraregional Exchange Services*

Because the RHCs are bound by the decree, it is necessary to reach the issues of consent decree interpretation presented in this appeal. In an earlier decision the district court ruled that two-way mobile telephone and one-way paging services are "exchange telecommunications services" within the meaning of the decree, *United States v. Western Electric Co.*, 578 F.Supp. 643, 645 (D.D.C.1983), and appellants US West, Bell Atlantic, and Pacific Telesis do not now contest this conclusion. They argue, however, that the district court erred in its January 13 decision in ruling that they are prohibited

by the decree from providing exchange telecommunications services outside of their respective geographic regions. There contentions in this regard are supported by *amicus* briefs filed on behalf of Ameritech, BellSouth, NYNEX, and Southwestern Bell.

This court has held that the "construction of a consent decree is essentially a matter of contract law . . . ." *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C.Cir.1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984). Accordingly, the district court's construction of the decree is subject to *de novo* review by this court. *See Willie M. v. Hunt*, 657 F.2d 55, 59 (4th Cir.1981). The principles of consent decree construction were elucidated by the Supreme Court in *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971), where it observed that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." It has further held that in the enforcement of a consent decree, "reliance upon certain aids to construction is proper, as with any other contract." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975). These include "the circumstances surrounding the formation of the consent order . . . ." *Id.* We need not decide whether this is a case where it is appropriate to consider evidence extrinsic to the consent decree, because in this case such evidence does not change our result. We conclude that neither the express language of the consent decree nor the circumstances of its formation will support the territorial restrictions imposed on exchange services by the district court.

None of the parties to the instant case contends that an explicit prohibition on the provision of extraregional exchange services is contained within the four corners of the consent decree. The district court found, however,

that "it is clear for a number of reasons that the Operating Companies were intended to be limited to their own local areas in furnishing exchange telecommunications services." *United States v. Western Electric Co.*, 627 F.Supp. at 1106. The district court listed eight such reasons, including both provisions of the decree that allegedly contain implicit geographic restrictions on RHC operations, and evidence extrinsic to the decree that purportedly reveals an intent to impose such restrictions. *Id.* at 1106-08. We have considered the reasons identified by the district court, as well as other "aids to construction" cited by the parties, but we are unable to conclude that the parties to the decree reached any agreement on the issue of extraregional exchange services.

We do not agree with the district court that various provisions of the decree implicitly impose geographic restrictions on RHC and BOC operations. The fact that the criteria set forth in section IV(G) for establishing exchange areas are all local in nature has no bearing on the question of whether a geographic restriction was intended to be imposed on all subsequent RHC and BOC exchange activities. The local nature of these criteria was merely a function of the need, at the time of divestiture, to divide the Bell System's local operations into coherent units in which BOCs could function without entering the interexchange, or long distance, business.

Similarly, the fact that section IV(G) assigned the responsibility for establishing exchange areas within their respective regions to the BOCs reflects nothing more than simple necessity. Prior to January 1, 1984, when the system of exchange areas came into effect, the BOCs were the only providers of local telecommunications service within their respective regions; there was no other logical entity to draw exchange areas. It does not follow from this that each BOC was precluded from providing exchange services in exchange areas drawn by other BOCs.

Identical logic explains why, pursuant to section I of the decree, AT & T assets necessary to provide local telephone service were distributed to the BOCs on a geographic basis. This plan of distribution merely shows that the initial division of markets was geographic; it does not mean that after divestiture the initial geographic boundaries were to be inviolable.

We are unable to understand the district court's suggestion that sections VIII(A) and VIII(B) of the decree, which authorized the BOCs to sell customer premises equipment and publish telephone directories, reveal an intent to geographically restrict other BOC operations. These sections, which were adopted as amendments to the decree at the court's insistence, merely authorize the BOCs to enter lines of business that would otherwise be prohibited to them under section II(D). Sections VIII (A) and VIII(B) plainly do not purport to lift any geographic restrictions on these activities to which the BOCs would be subject in the absence of the sections. Thus, far from supporting the district court's conclusion, the fact that all parties to the decree have assumed that the RHCs and BOCs may sell customer premises equipment and publish telephone directories on a nationwide basis supports appellants' claims. If the RHCs and BOCs may engage in these activities outside of their regions without a waiver of geographic restrictions, it is not unreasonable to assume that other activities permitted under the decree may be conducted nationwide as well.

In view of the foregoing, we conclude that there is no explicit or implicit geographic restriction of RHC and BOC operations contained within the four corners of the consent decree. When we look beyond the language of the decree, we remain unpersuaded that the parties to the decree intended to prohibit provision of extraregional exchange services.

We recognize that certain of the "aids to construction" in this case suggest that the parties and the district court assumed that the RHCs and BOCs would confine themselves to providing exchange services within their respective regions. For instance, in approving the proposed consent decree, the district court stated that "[e]ach of the divested Operating Companies will have a monopoly in only one geographic portion of one [telecommunications] market[]—local telecommunications." *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. at 187. Later, in a portion of its opinion approving the plan of reorganization submitted by AT & T pursuant to section I of the decree, the district court observed that "[w]ith respect to exchange telecommunications . . . the Operating Companies and the Regional Companies will, by definition, be limited to clearly defined geographic areas . . . ." *United States v. Western Electric Co.*, 569 F.Supp. 1057, 1081 (D.D.C.1983). Certain RHC filings with the Federal Communications Commission suggest that the RHCs may have shared the district court's understanding. *See* Comments of Associated Bell System Companies at 13, FCC CC Docket No. 83-115 (Apr. 25, 1983); Reply Comments of Associated Bell System Companies at 13, FCC CC Docket No. 83-115 (May 25, 1983); Joint Petition for Reconsideration of Indiana Bell, Michigan Bell, and Ohio Bell at 13, 15, 16, FCC CC Docket No. 83-115 (Feb. 10, 1984).

There are also indications in the record, however, that the drafters of the consent decree did not intend to prohibit the RHCs from furnishing exchange services outside of their respective regions. For example, both Assistant Attorney General for Antitrust Enforcement William F. Baxter and AT & T Vice President and General Counsel Howard J. Trienens testified before committees of Congress that it would have been possible under the consent decree for AT & T to combine all of the BOCs into a single nationwide operating company. *See AT &*

T Proposed Settlement: Hearings Before the Senate Comm. on Commerce, Science and Transportation, 97th Cong., 2d Sess. 73 (1982) (testimony of William F. Baxter); *Department of Justice Oversight of the United States v. American Telephone and Telegraph Lawsuit: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 112, 141-42 (1982) (prepared statement of William F. Baxter; testimony of Howard J. Trienens). This conclusion was compelled by section I(A)(4) of the decree, which states that "nothing in this decree shall require or prohibit the consolidation of the ownership of the BOCs into any particular number of entities." The possibility of a single nationwide operating company is obviously inconsistent with the existence of geographic limitations on exchange telecommunications, for if there were only one operating company it would necessarily provide local telephone service throughout the country.

The absence of geographic restrictions is also suggested by events surrounding Bell Atlantic's efforts to solicit the views of the Department of Justice concerning its plans to acquire A Beeper Company. As explained in affidavits filed with the district court, the Justice Department initially advised Bell Atlantic that the fact that A Beeper provided exchange services outside of the Bell Atlantic region would not place Bell Atlantic in violation of the consent decree. *See* Affidavit of James H. Dickerson ¶¶ 4-6. In fact, there was internal disagreement within the Justice Department as to whether the consent decree prohibited the provision of extraregional services, but the existence of this disagreement was not initially communicated to Bell Atlantic. *See id.* ¶ 12; Affidavit of James P. Denvir ¶ 6; Supplemental Affidavit of James P. Denvir ¶¶ 2, 3; Affidavit of Richard O. Levine ¶ 12. We consider the existence of internal disagreement to be significant, for if the Justice Department found the decree ambiguous in this regard, it is most unlikely that the parties to

the decree ever reached an agreement on the issue of extra-regional exchange services.

We suspect that the uncertainty surrounding this issue has a simple explanation: the parties and the district court never considered the possibility that the BOCs might want to provide exchange services outside of their geographic regions. It must be remembered that exchange service consists principally of local landline telephone service, and it is hardly conceivable that one BOC would want to enter another BOC's area in order to provide such traditional service in competition with the established BOC. This case, on the other hand, involves special types of exchange service that can be provided in competition with an established BOC, and we think it likely that the drafters of the consent decree simply did not consider such a possibility. Had they considered it, they might have proscribed it (though in view of its procompetitive effect, that is far from certain). The question before the court, however, is whether we may now read such a proscription into the decree. Under *Armour* and *ITT Continental Baking*, it is clear that we may not. We therefore reverse the district court's January 13 decision insofar as it held that the RHCs may not provide exchange telecommunications services outside of their respective regions.

C. *Orders Requiring Termination of Extraregional Exchange Services*

Because the consent decree does not limit the RHCs to providing exchange services within particular geographic areas, it necessarily follows that we must vacate the district court's February 14 order requiring the RHCs to cease providing extraregional exchange services. The court's subsequent orders granting waivers to Pacific Telesis, NYNEX, and Bell Atlantic are not before us. We assume, however, that the court will vacate these insofar as they purport to restrict the right of the RHCs to pro-

vide exchange services outside of their respective regions. Like the court's February 14 order, these orders incorrectly presuppose that the RHCs may not furnish such services without court authorization.

D. *Shared Tenant Services*

The final issue presented in this appeal is US West's contention that the district court erred in ruling that Ameritech's proposal to furnish certain shared tenant services would violate the decree's proscription on BOC involvement in the interexchange telecommunications business. The district court reasoned that the types of services Ameritech proposed to provide—least-cost routing and traffic analysis—would inject it into the interexchange business and would therefore contravene section II(D) of the decree. Ameritech has not appealed this decision, and we hold that US West does not have standing to independently appeal the decision.

It is axiomatic that "a party may only appeal to protect its own interests, and not those of a coparty." *Libby, McNeill, and Libby v. City National Bank*, 592 F.2d 504, 511 (9th Cir.1978). *See also Barry v. District of Columbia Board of Elections and Ethics*, 580 F.2d 695, 697 (D.C.Cir.1978). It follows that the district court's ruling on the shared tenant services issue is properly before this court only to the extent that it binds US West; Ameritech's failure to appeal leaves it subject to the ruling. *United Steelworkers of America v. University of Alabama*, 599 F.2d 56, 59 (5th Cir.1979). Because we conclude that the ruling does not bind US West, we must dismiss US West's appeal for want of standing.

As Ameritech acknowledged in the district court, shared tenant services "are in the gray area of an 'overlap' between exchange and interexchange activities." *United States v. Western Electric Co.*, 627 F.Supp. at 1099. A number of different types of services fall under the shared tenant services rubric, and it is not evident that all of them are properly characterized as interex-

change services. In deciding Ameritech's motion for clarification, the district court was required to determine whether the actual services that Ameritech intended to provide were most akin to permitted exchange or prohibited interexchange activities. The court's conclusion that Ameritech's proposal most resembled interexchange service cannot bind US West unless the actual services that US West wishes to provide are identical to those proposed by Ameritech. We have no basis for assuming that US West's proposal would be identical to Ameritech's and therefore we cannot find that US West is bound by the district court's ruling.

Were we to accept US West's invitation to review the ruling, we would have to speculate as to what services US West might wish to provide, and our decision accordingly would be little more than an advisory opinion. The rules of standing exist precisely to avoid the uncertainty that this course would entail. We accordingly hold that the share tenant services issue is not properly before this court. If US West wishes to pursue this issue, it should frame its own specific shared tenant services proposal, obtain district court review of the proposal if it deems such review prudent, and then appeal any adverse decision to this court.

III. Conclusion

For the foregoing reasons, we hold that the RHCs are bound by the AT & T consent decree, that the decree imposes no geographic restraints on the areas in which RHCs may provide exchange services, and that the district court erred in ordering the RHCs to stop providing exchange services outside of their respective regions. We do not decide whether shared tenant services are prohibited interexchange activities under the decree because US West is without standing to obtain review of the district court's ruling on this issue.

It is so ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 82-0192

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, *et al.*,
Defendants.

Jan. 13, 1986

OPINION

HAROLD H. GREENE, District Judge.

Pending before the Court for decision are a number of motions by various Regional Holding Companies for clarification of the decree.[1] The motions represent the view of several of the Regional Companies[2] that they are

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[1] Ameritech has filed three of these motions, requesting that the decree be interpreted to permit Regional Companies to provide (1) cellular radio services outside their geographic regions, (2) voice storage and retrieval services to cellular customers, and (3) shared tenant services. Pacific Telesis asks that the decree be clarified to allow it to provide exchange telecommunications services outside of California and Nevada. NewVector's motion asks for a ruling that its provision of cellular radio services outside of the U S West region is authorized by the decree. Each of the motions is supported by several other Regional Companies.

[2] Although the line of business restrictions in section II(D) of the decree are addressed to the Operating Companies without any

entitled under the decree to engage in a substantial range of telecommunications activities without obtaining waiv-

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explicit reference to the Regional Companies (which did not exist when the decree was negotiated), they clearly also apply to the latter, and arguments to the contrary (see note 18 *infra*) are without merit.

Section III provides that the provision of the decree shall be binding upon the parties and each of the Operating Companies, including "their affiliates, successors and assigns. . . ." Section IV(A) goes on in pertinent part to define an "affiliate" as any organization or entity under direct or indirect common ownership with or control by AT & T, and "subsidiary" as any organization or entity in which AT & T has stock ownership, and section IV(C) defines the term "BOC," *i.e.*, Operating Company, *inter alia*, as "any entity directly or indirectly owned or controlled by [an Operating Company] or affiliated through substantial common ownership."

The Regional Companies were created prior to divestiture pursuant to the Plan of Reorganization as wholly-owned subsidiaries of AT & T. That plan, submitted by AT & T to the Court for approval pursuant to section VIII(J) of the decree, implemented divestiture in part by requiring AT & T to contribute its stock in the Operating Companies to the seven newly-created Regional Companies and then separating these companies from AT & T. The plan proceeded on the premise that regional centralization of the ownership and management of the Operating Companies would result in a more efficient and practical restructuring of the local telephone industry than would have been possible with the establishment of all twenty-two Operating Companies as entirely independent and unrelated entities. See Part IV(A)(6) of the Plan of Reorganization notes 422 and 423. *See also, United States v. Western Electric Co.*, 569 F. Supp. 1057, 1062 n.5 (D.D.C. 1983), *aff'd, California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983); Department of Justice Competitive Impact Statement, 47 Fed. Reg. 7170, 7174, 7175 (February 17, 1982).

The Department of Justice's Competitive Impact Statement, in discussing the possibility that the Plan of Reorganization might be implemented by AT & T's transfer of the portion of its business providing local exchange service to new corporate entities, noted that "the local exchange enterprises would become [Operating Companies] for the purposes of this . . . [j]udgment regardless of their corporate name." 47 Fed. Reg. at 7174.

It is clear from the decree, the Plan of Reorganization, the Court's Opinions, and the Competitive Impact Statement that the

ers pursuant to section VIII(C) of the decree. In each case, the proffered interpretation is opposed by other entities, both commercial and governmental, which argue that the particular activities are prohibited by the decree.

After careful scrutiny of all the relevant factors, the Court has determined that the interpretations of the decree advocated by the Regional Companies in these motions are inconsistent with the language, history, and purposes of the decree,[3] and that all the motions for clarification[4] must therefore be denied. Before discussing the motions in detail, it is appropriate to restate the basic purpose underlying the prohibitions imposed by the decree on the local companies.

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establishment of the Regional Companies served only logistical purposes, and that it was not to have any substantive effect on the obligations of the entities exercising local telecommunications authority. It is likewise clear that the Regional Companies are bound by the decree both as subsidiaries of AT & T prior to divestiture and as affiliates of the Operating Companies subsequent thereto. Insofar as the prohibitions in the decree are concerned, the Operating Companies and the Regional Companies occupy identical positions, and the two types of entities will generally be referred to herein without distinction. See *United States v. Western Electric Co.*, 604 F. Supp. 256, 257 n.3 (D.D.C. 1984); *United States v. Western Electric Co., supra*, 569 F. Supp. at 1062 n.5.

[3] See *United States v. AT & T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983); *United States v. Western Electric Co.*, 592 F. Supp. 846, 855-58 (D.D.C. 1984).

[4] As MCI correctly points out, only a few months ago the Court established a detailed procedure and guidelines for Regional Companies to follow in requesting waivers from the line of business restrictions of the decree. The "clarification" strategy employed by the Regional Companies would undercut that process for the securing of relief from the provisions of the decree by the simple act of labelling the pleadings as requests for clarification rather than as motions for waivers or for modifications. MCI Opposition to Ameritech's Motion to Provide Cellular Service at 2-3.

I

General Considerations

A central rationale for the divestiture of AT & T was the recognition that, when one company engages both in monopoly activities—*e.g.*, the provision of local telecommunications service—and in competitive activities—*e.g.*, the provision of interexchange [5] and information services—it possesses the incentive and the ability improperly to exploit its local monopoly power in at least two ways.

First, such a company may subsidize its competitive ventures with income generated by the local telephone ratepayers (who, unlike the customers of a competitive enterprise, lack the ability to go elsewhere for their telephone service and who can therefore be charged whatever rates the local regulators can be persuaded to approve); [6] and second, it can give preferential treatment [7] to its own competitive affiliates, thereby impeding the success of non-affiliated competitors or even forcing them out of business.[8] Evidence was adduced by the government in the trial of this case that the Bell System was guilty of such practices.[9]

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[5] Interexchange services will sometimes also be referred to herein as long distance services, although some intra-LATA services—which are permitted to the Operating Companies—may also be regarded as long distance.

[6] See discussion in *United States v. Western Electric Co., supra*, 592 F. Supp. at 853-55.

[7] Such preferential treatment might consist, *inter alia*, of slowdowns in the interconnection of competitors' networks to the local switches; the grant of higher quality access to the monopoly provider's own competitive services; abusive regulatory and legal tactics; the manipulation of price for access; and the design of the local networks in such a manner as to discourage competition in the information field. *See United States v. AT & T*, 524 F. Supp. 1336, 1353-57 (D.D.C. 1981).

[8] See Competitive Impact Statement, *supra*, 47 Fed. Reg. at 7171.

[9] For example, there was evidence to support the Justice Department's claims that AT & T engaged in the types of practices re-

The history of the government's struggles with AT & T [10] indicated to those who negotiated and approved the current consent decree that, when the local companies were divested to continue on their own the provision of the local monopoly telecommunications services, they had to be prohibited from engaging also in competitive long distance and information services.[11] Accordingly, a specific prohibition to that effect—one of the few decree pro-

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ferred to above to impede interexchange competition from such companies as MCI, and to hinder competition in the sale of telecommunications equipment from a number of small manufacturers and suppliers. See *United States v. AT & T, supra*, 524 F. Supp. at 1348-57; see also, *United States v. AT & T, supra*, 552 F. Supp. at 160-62.

[10] An antitrust suit brought against AT & T in 1949 resulted in a consent decree signed in 1956, but that decree soon proved to be inadequate to solve the problems created by AT & T's status and actions. Thereafter, the Federal Communications Communication conducted several studies and took a variety of actions but in spite of these efforts it ultimately appeared that these activities could not, by themselves, overcome the advantages possessed by the Bell System, including its mixed monopoly-competitive position. It was because of these advantages that the instant lawsuit under the antitrust laws was brought in 1974 and maintained consistently thereafter by the Ford, Carter, and Reagan Administrations in spite of pressure to abandon it from both AT & T and several government departments. See generally, *United States v. AT & T, supra*, 552 F. Supp. at 170; Competitive Impact Statement, *supra*, 47 Fed. Reg. at 7171-72.

[11] Not one of the designated chief executive officers of the soon-to-be established Regional Companies suggested or intimated in the public interest proceeding held by this Court that, in addition to the local monopoly role assigned to them by the decree, the companies needed, required, or were at all interested in providing interexchange or information services. Although the companies which these executives represented were at the time still parts of the Bell System, they were encouraged by the Court, and they did, speak candidly about a number of issues of concern to these companies. See *United States v. Western Electric Co., supra*, 569 F. Supp. at 1062 and n.4.

visions directly applicable to the local companies—was incorporated in the decree.[12]

The logic of such a provision was as obvious as its incorporation in the decree was crucial. Without it, the result of the break-up would have been to exchange one nationwide monopoly with the incentive and ability to exploit monopoly power and injure competition for several smaller monopolies with the identical incentives and abilities. The only distinction between the "old" Bell System and the present Regional Company system was and is that the Bell monopoly was nationwide in scope while each of the seven Regional Companies possesses an equally powerful monopoly [13] in a particular geographic region.[14]

Insofar as the threat of injury to competition, competitors, and ratepayers is concerned, that distinction is one without a difference, for the "bottleneck" [15] monopolies continue to exist as before. These bottlenecks—*i.e.*, the local companies with their ownership of the local switching systems and thus of the pathways which the interexchange and information providers must use if they

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[12] Section II(D)(1) provides that after completion of the reorganization, "no [Operating Company] shall, directly or through any affiliated enterprise . . . provide interexchange telecommunications services or information services. . . ." The only other specific prohibition, found in section II(D)(2), prevents local operating companies from manufacturing customer premises equipment, and was included in the decree because of concern over the potential for similar types of anticompetitive behavior.

[13] The Regional Companies exercise these monopolies through their affiliated Operating Companies.

[14] See Parts III and IV *infra*, for a discussion of the current efforts of the Regional Companies to break down even the geographic restrictions of the decree.

[15] *See United States v. Terminal R.R. Assn. of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

wish to reach the ultimate consumers [16]—merely changed hands: instead of being controlled by the management of AT & T, they are now being controlled in each region by the management of a particular Regional Company. However, the ability to exploit the bottlenecks anticompetitively has remained precisely the same. It was on this basis that the prohibition against the provision of interexchange and information services became a central part of the decree.

That prohibition has far from outlived its usefulness.[17] Indeed, it could with some justification be argued that the Regional Companies, though obviously smaller than the Bell System, present dangers to competition that are in some respects even greater than those presented by that System.

AT & T was imbued with a service mentality, a tradition dating from the days of the chairmanship of Theodore Vail and continued through that of John deButts and Charles Brown. Although the company may have engaged in some or all of the anticompetitive activities with which it was charged, the balance wheel of the service tradition was always present. By contrast, the Regional Companies, or some of them, indicate by their public statements, their advertisements, and their rush to diversification, combined with their relative lack of interest in basic telephone service itself,[18] that an ascent

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[16] Although there has been some "bypass" of the local telecommunications systems which could potentially decrease dependence upon the bottleneck facilities controlled by the Regional Companies, by and large the technology and the economics are still such that the monopoly of these companies on local telephone service with respect to the overwhelming majority of the population has not been impaired.

[17] See discussion *infra*, note 26, on provisions in the decree for reviewing and removing decree's restrictions on the Regional Companies.

[18] Some of these companies, although created by the decree as providers of local telephone service, do not even acknowledge that the provisions of the decree apply to them, and they insist that

into the ranks of conglomerate America rates far higher on their list of priorities than the provision of the best and least costly local telephone service to the American public.[19] Anyone faced with the prospect of permitting

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the Court should not be concerned with the quality and price of such service. Reply Comments of U S West to Ameritech Motion for Shared Tenant Services at 2 note 2; U S West Post-Hearing Statement of August 14, 1985 at 10.

The assumption that high-quality, low-cost telephone service would be provided by the local companies was an essential ingredient in the Court's determination that the consent decree was in the public interest; in the Court's successful request for several modifications of the decree (to grant authority to the Regional Companies to market CPE and the Yellow Pages); and in the Court's demand for changes in the Plan of Reorganization (to transfer the "Bell" name and logo to the local companies and to award them access to AT & T's patent licenses). *United States v. American Telephone and Telegraph Co., supra*, 552 F. Supp. at 192-94; *United States v. Western Electric Co., supra*, 569 F. Supp. at 1078-81; *United States v. Western Electric Co.*, 569 F. Supp. 990, 996-97 (D.D.C. 1983). In light of that history, disdain shown by some Regional Companies for their telephone obligations is as inexplicable as it is disconcerting. Of course, not all the Regional Companies are oblivious of their obligations. *See, e.g.*, BellSouth Post-Hearing Memorandum of August 14, 1985.

[19] Although corporations engaged in competitive enterprises may merge, acquire, be acquired, or enter into foolish or unprofitable ventures, subject only to the discipline of the market and of such antitrust considerations as may be applicable, public utilities are not under such discipline and are in a different position: as the name implies, their *raison d'etre* is to serve the public. See generally, Garfield and Lovejoy, *Public Utility Economics*, 1-36 (1964). The public is entirely dependent upon the service they provide; it has a vital stake in its continued availability; and it can therefore always be depended upon to bail these companies out—through high or repeated rate increases granted with the compulsion of law by regulatory bodies—should they be neglectful or commit errors which jeopardize the continued availability of the service. *See United States v. Western Electric Co., supra*, 592 F. Supp. at 869-70. See also, *Re Tax Treatment of Accelerated Depreciation*, 33 P.U.R.3d 209, 214 (1960).

As a necessary corollary of the ability to command rates that generate profits, and in recognition of the public interest in such

these companies to enter competitive markets, particularly the interexchange and the information markets,[20] would therefore have to exercise considerable caution lest the companies be empowered, even encouraged, to use their local monopoly advantage as a means to decimate the competition in these markets and thus to enhance further their conglomerate ambitions.[21]

Moreover, unlike the Regional Companies, the Bell System was constrained significantly by the 1956 consent decree in that many of the newer technological markets, *e.g.*, computers, were out of its reach, and the System's managers were therefore content to concentrate their efforts on telecommunications. The Regional Companies, by contrast, are already expanding in almost every conceivable way, from real estate ventures to foreign trade, from publishing to computer retailing. Financial subsi-

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companies, most public utilities are closely regulated on both the state and federal levels as to what non-utility businesses they may operate. Holding companies owning public utilities are likewise closely regulated as to other businesses they may acquire or retain. See, *e.g.*, Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 *et seq.*; *Michigan Consolidated Gas Co. v. SEC*, 444 F.2d 913 (D.C. Cir. 1971); *Re Pequot Gas Co.*, 53 P.U.R.4th 598, 617 (Conn. 1983).

[20] It is with respect to these markets that the local telecommunications monopoly is most suspectible of successful anticompetitive manipulation.

[21] The decree in this case did not distribute the bulk of the assets of the American Telephone and Telegraph Company to the Regional Companies to enable the managers of these companies to use them as building blocks for the establishment of conglomerates unrelated or only marginally related to basic telephone service for the American public. See also, note 18, *supra*. These companies inherited billions of dollars in tangible and intangible assets at the time of divestiture because the Court and others concluded that these assets would be used in the public interest, that is, in the provision of excellent yet low-cost telephone service to American consumers, and that this objective would be accomplished without the re-creation of the dangers to fair competition that existed before. This Court firmly intends to enforce the decree in light of that purpose.

dies from ratepayer-supported local telephone activities to these many types of operations are both easier to hide and harder to detect than subsidies to only a few "outside" enterprises, and so are manipulations of the local loops to disadvantage the many competitors in the myriad of enterprises in which the Regional Companies are engaged.[22]

Through the memoranda filed by the Regional Companies in support of the Ameritech motion runs the thread that greater competition and the participation of more competitors in the telecommunications markets are in the public interest[23]—certainly an unexceptionable point as a generality. However, such arguments are drained of much of their persuasive force when they are applied to a situation where the would-be competitors could readily take advantage of their monopoly status in a variety of ways vis-a-vis their non-monopolistic competition.[24]

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[22] The Regional Companies claim here, as they have claimed earlier in other matters before the Court, that protection against anticompetitive practices and ratepayer gouging may safely be left to the local regulatory bodies. See *United States v. Western Electric Co., supra*, 592 F. Supp. at 854-55; see also, Ameritech Motion to Provide Cellular Services Outside its Region at 14; Reply Comments of U S West to Ameritech Motion to Provide Shared Tenant Service at 18; U S West Post-Hearing Statement of August 14, 1985 at 10-13. That, too, was an argument used by the Bell System, but on examination it was usually found to lack substance. See, *e.g., National Association of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630, 636-38 (D.C. Cir. 1976). The broad sweep of the Regional Companies, with their various competitive and non-competitive subsidiaries and affiliates, constitutes a significant impediment to effective oversight by local regulators who are confined to a single State. In any event, the Court is not relieved of its obligations under the decree (see section VII, VIII) because others may have responsibilities in related areas.

[23] See, *e.g.*, Ameritech Motion to Provide Cellular Services Outside of Region at 3, 8-17.

[24] An additional argument being advanced by the Regional Companies is that, should they not be permitted to enter the inter-

For that reason, the participation of the Regional Companies in the markets they wish to enter [25] would not be

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exchange markets, their financial ability to render local service, and hence that service, will suffer. See, *e.g.*, Ameritech Motion to Provide Shared Tenant Services at 5, 8-9, 15; Comments of US West in Support of Ameritech's Motion, to Provide Shared Tenant Services at 8-10. The Court has granted numerous waivers of the line of business restrictions to allow the companies to engage in a great variety of "outside" businesses. See, *e.g.*, *United States v. Western Electric Co., supra*, 604 F. Supp. at 257; Memorandum Order of August 22, 1985; Order of August 14, 1985; Order of May 24, 1985; Order of March 1, 1985. There is no reason why they cannot prosper financially in the exchange telecommunications and exchange access markets, the CPE and the directory advertising markets, and the new and legitimate outside enterprises which they have been allowed to enter. And in fact, they do appear to be flourishing financially. See text to note 60, *infra*.

The Regional Companies would be assured of extra-substantial financial profits in the interexchange and information markets only if they behaved the way the Bell System was found in several lawsuits to have behaved: by artificially disadvantaging their competitors in these markets with respect to access to the local networks or by cross-subsidization. See *United States v. AT & T, supra*, 552 F. Supp. at 189 n.235.

[25] To be sure, the current motions do not baldly assert that the Regional Companies have the right under the decree to engage in the interexchange and information businesses without limitation. It is worthy of note, however, that representatives of these companies are widely quoted in the press as desirous of breaking down these prohibitions entirely. See, *e.g.*, *Washington Post*, December 30, 1985, Washington Business Section at 1, 13; *Business Week*, December 2, 1985, at 94, 97, 101; *Wall Street Journal*, November 25, 1985, at 1, 22; *New York Times*, December 2, 1985, Section D, at 4; *Wall Street Journal*, February 24, 1984 at 40.

In any event, as discussed below, were the motions to be granted, the effect would be to position these companies on a slippery slope from which they could readily move to yet broader participation in the forbidden markets. That this concern is not chimerical is borne out by experience. To cite but one example out of several, in 1983 the Court granted the requests of some of the Regional Companies for entry into cellular markets outside of their exchange boundaries in several areas. *United States v. Western Electric Co.*,

likely to promote genuine, fair competition; the more probable outcome would be that such entry would deny to others engaged in commerce in those markets the level playing field to which they are entitled under law, under the decree, and in plain equity and justice.[26]

The current motions must and will be considered in that context.

II

Shared Tenant Services

In its shared tenant services motion, Ameritech [27] is asking for an order which would "clarify" the decree [28]

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578 F. Supp. 643 (D.D.C. 1983). Although that granted was limited to nine metropolitan areas with special problems, although it was explicitly described as so limited, and although it was clearly only a waiver of decree provisions, the Regional Companies are now blandly claiming that this precedent entitles them to enter the cellular market as of right, without a waiver, and on an unlimited, nationwide basis. See Ameritech Motion to Provide Cellular Services Outside of Region at 15 and note *; Ameritech Reply Memorandum on Motion to Provide Cellular Services Outside of Region at 7-8; Reply of NewVector to Responses to Ameritech's Motion at 3. The limitations at issue are too critical to the health of the nation's telecommunications industry to be so whittled away.

[26] The Regional Companies also suggest as a justification for being permitted to enter the markets at issue here that they are or soon will be beset by competition for the local telecommunications markets, in the form of bypass or otherwise. Section VIII(C) of the decree provides for this eventuality by stating that an Operating Company may enter a prohibited market when there is "no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." With respect to interexchange and information services, that means that an Operating Company may enter these fields when its own local monopoly has ended and there is substantial competition in the particular local telecommunications market. *United States v. Western Electric Co., supra*, 592 F. Supp. at 867-68. No movant has claimed that this condition now exists, and it plainly does not.

[27] The Ameritech motion is supported by two other Regional Companies, US West and Southwestern Bell.

[28] As is true with respect to all the motions, if the decree were "clarified" as the Regional Companies request, it would permit

to the effect that it permits the Regional Companies to provide certain shared tenant services,[29]—the marketing of automatic carrier selection and traffic analysis.[30]

The shared tenant services market has developed substantially over the past few years,[31] for such services present several advantages to both developers and tenants.[32]

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them to avoid having to meet the test of section VIII(C)—that there is no substantial possibility that they could use their monopoly power to impede competition in the market they seek to enter.

[29] Shared tenant services are the provision by a developer or building owner of a package of telecommunications and related services to tenants. Tenants' needs are then served on a shared basis using centralized voice and data switches and computers on the building premises. Ameritech Motion to Provide Shared Tenant Services, Exhibit A, at 2.

[30] Automatic carrier selection, a feature which can be offered through a shared PBX or Centrex, permits the switch to be programmed so as to select automatically an interexchange carrier for the caller. Such selection may be but is not necessarily based upon the lowest cost. In a shared tenant system, the provider programs the switch, and when a tenant thereafter attempts to make an interexchange call, the switch selects the pre-programmed carrier.

Traffic analysis involves the compilation and collation of data on the tenants' telecommunications usage—both individual and aggregate. Such analysis, when performed by a Regional Company, permits that company to recommend exchange and interexchange services as well as CPE and access lines to handle the traffic.

[31] According to Ameritech, before 1983 there were virtually no buildings with advanced shared-service capabilities while today there are some 70 such facilities in operation and another 50 expected shortly. Ameritech Motion to Provide Shared Tenant Services, Exhibit C, p. 2. *But see* Reply of Multi-Tenant Telecommunications Association (MTTA) to Comments on Ameritech Motion to Provide Shared Tenant Services at 4-5. According to some, that development is due to the competitive availability of interexchange services.

[32] Among the benefits to tenants are the cost savings associated with the aggregated demand which, depending upon the pricing policies of the providers of the services, may permit these tenants to acquire customer premise equipment, exchange services, and

Accordingly, several independent companies have entered these markets, and the Regional Companies now seek to penetrate them as well. However, as will be seen, the shared tenant services at issue in this motion are interexchange services, and the local companies are therefore prohibited by the decree from providing them.

A. *Regional Company Contentions*

The Regional Companies concede that the proposed activities are in the gray area of an "overlap" between exchange and interexchange activities,[33] but they go on to argue that where this is the case, the decree permits them to engage in all of the activities involved in the overlapping areas, both exchange and interexchange.[34]

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interexchange services at lower, volume-based prices. Tenants may also have available to them a broader range of products and services than would be true otherwise. See generally, Ameritech Motion to Provide Shared Tenant Services, Exhibit A, at 4-5.

[33] US West takes the position that the proposed activities are neither interexchange in character nor in a gray or overlap area but constitute exchange functions. Comments of US West to Ameritech Motion to Provide Shared Tenant Services at 10-17. There is no validity whatever to that contention. The US West argument proceeds on the basis of two premises: (1) that all telecommunications functions performed within an exchange area are exchange services except only those which actually cross exchange boundaries, and (2) that "interexchange telecommunications" and "interexchange telecommunications services" represent identical concepts. For the reasons discussed in the text below, both of these premises are erroneous.

The only other Regional Company to file a memorandum on this issue (Southwestern Bell) supports Ameritech. Oppositions were filed by AT & T, MCI, TDX Systems, Inc., the North American Telecommunications Association (NATA), MTTA, and the Department of Justice. Sharetech (a partnership consisting of United Technologies Building Systems Company and AT & T Information Systems) initially filed comments opposing the Ameritech motion but subsequently withdrew these comments.

[34] Ameritech Memorandum in Support of Motion to Provide Shared Tenant Services at 2-14, 15-16.

That reasoning is erroneous if only because it proves too much. The very nature of modern telecommunications requires the two functionally distinct systems to meet: access to interexchange services is obtained through the local exchange provider and both use the same equipment.[35]

The overlap is thus inherent in the technology,[36] and to cede the area it covers to the Regional Companies would allow them to enter the interexchange market by the back door on a wholesale basis[37] when their front-door entry into that market is prohibited by the most basic provisions of the decree. See Section II(D)(1) of the decree which provides, without exception or ambiguity, that "[a]fter completion of the reorganization . . . no [Operating Company] shall . . . provide interexchange

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[35] In fact, the "exchange access," over which the Operating Companies have jurisdiction, is defined in section IV(F) of the decree "as the provision of exchange services for the purpose of originating or terminating interexchange telecommunications."

[36] The division between exchange and interexchange services is fundamental, representing a line of certainty in an otherwise volatile and rapidly developing industry. A grant of Ameritech's motion would introduce the kind of uncertainty into the system that could be used by the Regional Companies to advance ever deeper into the interexchange business even as they retain their local monopolies. See note 25, *supra*; pp. 1097-98 *infra*; and see, Response of NATA to Ameritech Motion to Provide Shared Tenant Services at 3.

[37] Ameritech goes so far as to assert that, since "[c]oordination between exchange and interexchange services is essential to prevent degradation of service," and since "[c]oordination between CPE and interexchange services is also vital," the Regional Companies must be allowed to operate over the entire range of the overlap (Memorandum at 17), lest they be "imprison[ed] . . . in a narrow, unworkable range of activities, threatening their competitive viability in their permitted lines of business" (Memorandum at 17-18). If this line of argument were to prevail, it would completely undermine the prohibitions of the decree.

telecommunications services . . . ." In short, the "overlap" argument entirely lacks merit.

B. *Shared Tenant Services Are Interexchange Services*

There is an even more fundamental reason why the requests of the Regional Companies must be rejected—one that relates to the kinds of activities that are subsumed under the rubric of shared tenant services.

Both from the point of view of the statutory language and from that of the purpose of the decree, the prohibitions in section II(D) restrict the Operating Companies not merely from providing transmissions from a point in one exchange area to a point in a different exchange area but also from engaging in activities that comprise the business of providing interexchange services.

If the decree had been intended to restrict the local companies only from the interexchange transmissions themselves, a prohibition on the provision of "interexchange telecommunications" would have been entirely adequate. But the decree goes further to prohibit these companies in section II(D)(1) from providing "interexchange telecommunications *services*." The term "services" obviously has, and it must be accorded, meaning and, as will now be seen, that meaning is far broader than is implied by the construction of the statute advocated by the Regional Companies.

We begin with the obvious. The Operating Companies are excluded from the provision of interexchange services in order to prevent them from becoming competitors of the interexchange carriers. See Part I, *supra*. On this basis, many of the arguments advanced by the Regional Companies—designed to demonstrate that there is little likelihood of their steering the shared tenant customers to one interexchange carrier rather than an-

other[38]—are largely beside the point,[39] for they fail to address the principal problem to which section II(D)(1) of the decree is addressed: *the threat of competition by the Regional Companies themselves in the interexchange business.*

Interexchange transmission capacity is transformed into an interexchange service that can be offered for hire,[40] *i.e.*, an interexchange business, by the performance of functions that are normally and necessarily performed by those who are engaged in that business (and who would therefore be competing with the Regional Companies with respect to these functions if the motion were granted). The issue of what constitutes an interexchange service or business is most usefully con-

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[38] See Ameritech Motion to Provide Shared Tenant Services at 21.

[39] That is not to say that the ability and the incentive of the Companies to cooperate with particular interexchange carriers and to favor them in various ways is not a problem in terms of local company participation in shared tenant activities. Even though a particular Regional Company might not be directly selecting a certain interexchange carrier, it would be a simple task so to perform the traffic analysis and so to arrange the marketing that the carrier favored by the Regional Company would emerge as the ultimate selection. Further, the Regional Company would in any event be marketing a telecommunications package that included interexchange services—a fact that would give the company a strong incentive so to manipulate the switching and the priorities that the interexchange carrier selected for the shared system would prevail over competing carriers.

Moreover, the success of a developer's offering of a shared system would depend in significant part upon the success of the Regional Company in "selling" to the tenants the interexchange services included in the automatic carrier selection service. Thus, even if the Regional Company did not itself select the interexchange carrier, once it began marketing the package, it would have a direct financial interest in ensuring that a particular mix of carrier—those offered by the developer in conjunction with the Regional Company —was selected.

[40] See section IV(P) of the decree.

sidered in the context of what Regional Companies would be doing with respect to shared tenant services in the event the motion were granted and to compare these activities with the activities of interexchange enterprises.

First. The Regional Companies would, at a minimum, be aggregating demand within a building and purchasing bulk interexchange services based on that demand for resale to the end users, *i.e.*, the tenants.[41] The purchase of *interexchange* capacity on a wholesale basis (*i.e.*, at prices that reflect total demand in a particular context) and its sale at retail clearly constitutes the provision of interexchange services under the decree.[42] Those engaged in such an activity are referred to as resellers, that is, interexchange providers.[43]

If the Regional Companies performed such an activity, that is, if they purchased interexchange services at a bulk price based on the demand in a particular building

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[41] To be sure, Ameritech argues that such aggregation of demand by the Regional Companies allows tenants to obtain CPE, exchange, and interexchange services at lower, volume-based prices than their individual demand would justify. That may well be true, but Ameritech does not discuss the alternative: that entities other than monopoly exchange providers would perform this service for tenants, and that they, too, could do so at volume-based prices. However, the important fact for present purposes is that aggregation and resale constitute interexchange business activities.

[42] The aggregation and resale function is crucial to the success of a shared tenant services enterprise. See Ameritech Motion to Provide Shared Tenant Services at 5, 8, 21; see also, Bell Atlantic Reply at 9, 10-11; US West Response at 8; see also, the statement of Ameritech's Indiana Bell Communications subsidiary which described a shared tenant service as a "resale of long distance" (July 27, 1984 presentation on Multi-Tenant Services in Indiana). Department of Justice Memorandum of August 27, 1984, Appendix B.

[43] Many of the companies engaged in the interexchange telecommunications business do not own transmission facilities but are resellers. Resellers are considered common carriers by the FCC. See Competitive Common Carrier Service, Second Report and Order, 91 F.C.C.2d 59 (1982), on reconsideration, 93 F.C.C.2d 54 (1983).

and then sold such services at retail at higher prices to the building's tenants—they, too, would be resellers in the interexchange business, and they would be in direct competition with other resellers and with facilities-based interexchange carriers.

Second. The Regional Companies expect to perform these functions by making selections of interexchange capacity on what they deem the lowest-cost basis [44] and by marketing the services thus assembled.

Given the existing technology and the economics of the interexchange business, the selection process is exceedingly complex, involving many variables.[45] Both facilities-based carriers and resellers market their services based on comparisons of their particular rates, or mix of rates, with the rates of their competitors in the interexchange business, in efforts thereby to persuade the ultimate users to purchase their services rather than those of other interexchange providers.

These marketing features are also integral to the shared tenant services plan of the Regional Companies, and these companies would thus be directly competing with the legitimate interexchange providers through their own rate comparisons. One example of such a rate comparison already in being is a promotional brochure published by the provider of shared telecommunications services to the World Trade Center building in New York City soliciting potential subscribers among the

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[44] Ameritech Motion to Provide Shared Tenant Services at 19, 21.

[45] Facilities-based interexchange carriers, such as AT & T and MCI, provide interexchange services through many offerings with differing rates, from high-priced ordinary MTS service, through discount WATS service, to even lower-priced dedicated network and other bulk rate services. Special rates may be offered to customers depending upon the volume of their business, and the cost of the service may further vary depending upon the time of day, the route, the relative occupancy of the circuits and switches, and other factors.

building tenants by comparing its offerings against the offerings of other providers and by comparing its rates directly with those of AT & T, MCI, and Sprint.[46]

Third. The Regional Companies would not only be purchasing and marketing interexchange services, they would also be selecting carriers for their customers and procuring additional interexchange services for them.

In connection with the phase-in of equal access,[47] the interexchange carriers are undertaking elaborate and expensive campaigns, through the media and otherwise, to induce individual customers to presubscribe to their particular services. The cooperation of the Operating Companies is an essential element in that effort [48] to bring about free and fair competition among the various interexchange carriers,[49] and the Operating Companies are even "expected to assist the interexchange carriers by

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[46] Department of Justice Memorandum of August 27, 1984, Appendix D. It may be expected that a prospective customer of a shared tenant services system would compare the cost of the Regional Company package with the cost of bulk rates offered by a single interexchange carrier or perhaps a package of shared tenant services offered by a joint or cooperative venture of interexchange carriers. In that situation, there could be no question that the customer would be choosing interexchange services between competing businesses, and that the Regional Company managing its shared tenant service would have every incentive to did whatever it could to ensure that the customer chose its system. See, *e.g.*, pp. 1102-03 *infra*.

[47] Appendix B of the decree. *United States v. AT & T*, *supra*, 552 F.Supp. at 232-34.

[48] The purpose of this effort is to effect a change-over from the AT & T de facto monopoly to a competitive interexchange market.

[49] See generally, *United States v. Western Electric Co.*, 578 F.Supp. 668, 677 (D.D.C. 1983). The Federal Communications Commission has since modified the mechanics of the presubscription process. See generally, *Investigation of Access and Divestiture Related Tariffs*, 50 Fed.Reg. 24982 *et seq.* (June 24, 1985).

means of such measures as making lists of non-presubscribed customers available to them." [50]

An analysis of the shared tenant services proposal of the Regional Companies indicates that they expect to stand this presubscription process on its head. Instead of assisting the interexchange providers in their efforts to "sign up" interexchange customers, the Regional Companies are seeking to offer a presubscription option of their own. If the Ameritech motion were granted, the tenant-customers would be expected to subscribe not to a legitimate interexchange carrier but to the Regional Companies, and those companies, in turn, would make the arrangements for choosing the interexchange services and options to serve those customers.

Here again it is clear that the functions involved—the selection of carriers and the procurement of interexchange services—constitute integral part of the interexchange business, and that, by performing these functions, the Regional Companies would be directly competing with the interexchange carriers for that business.[51]

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[50] *United States v. Western Electric Co., supra*, 578 F.Supp. at 676 note 41.

[51] As the Department of Justice has pointed out, the existing prohibition on the selection of interexchange carriers by the Regional Companies does not mean that these companies may not coordinate with such carriers in the installation of interexchange services independently selected and procured by a customer, or that they may not coordinate the testing and repair of interexchange services where they provide the CPE or the exchange access facilities that are links in such services. Memorandum of August 27, 1984 at 29.

Indeed, in order to minimize legitimate complaints from the public about poor coordination between local and interexchange carriers with respect to repair of equipment and otherwise, the Regional Companies should undertake such tasks. To the extent that they may have refrained from doing so in the past as a means of control of these markets, including the interexchange market, this Opinion may induce them hereafter to cooperate more fully with other telecommunications service providers in good faith.

Fourth. The Regional Companies would be performing the interexchange switching and routing function, which takes calls from customers and directs them to their destination. That function would be performed by these companies in lieu of its performance by an inteexchange carrier, particularly where the calls would not simply be routed to a particular carrier but to a particular service of a carrier, such as a private line.[52]

However, the switching and routing functions quite obviously constitute key parts of the interexchange business, and the Regional Company activities in that regard would be performed in direct competition with the interexchange carriers in the interexchange business.

In addition to the general threat arising from the Regional Companies' monopoly there is a special threat to fair competition by these kinds of activities, for at least two reasons. In the first place, a Regional Company, unlike any other competitor, could use its market power in the provision of exchange access[53] to maximize the interexchange carriers' costs with respect to such access while minimizing the rates paid for interexchange services by its own shared services enterprise. Furthermore, a Regional Company, again unlike any other interexchange competitor, could use its control over exchange access to become the dominant purchaser of interexchange services in its region, thereby further to establish its dominance with respect to interexchange rates and hence with respect to the interexchange market.

C. *Potential for Expansion*

All these problems are further exacerbated by the virtually unlimited potential in the event of a grant of

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[52] For example, a Regional Company could direct an interexchange call from City Y to City X by switching it with the City Y exchange area to a private line ending in City X. See also, note 45, *supra*.

[53] The Regional Companies presently have a monopoly with respect to exchange access. See section II(D)(3) of the decree.

the Regional Company request and the absence of a logical stopping point.

As presently framed, the Ameritech motion is restricted to shared services involving only tenants in a particular building. However, neither principle nor technology require such a limitation.[54] Just as it is aggregating the demands of the tenants in a particular building, a Regional Company could as easily aggregate demand with respect to a group of buildings, a section of a city, certain types of businesses, or even among all subscribers to its central office switch.[55] Having done so, it could offer interexchange services to all such subscribers on the same basis as those services would initially be offered to tenants in one building.

What would thus be likely to happen is that, in relatively short order, the Regional Companies would become the purchasers of interexchange services for all the telephone subscribers in their exchange area, leaving to the interexchange carriers only the role of providers of leased facilities for integrated interexchange services marketed and offered by the Regional Companies.

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[54] As discussed above in note 25, the Regional Companies not infrequently seek to carry limited precedents to unintended extremes. In this particular instance, they could enlarge the permitted area with considerable justification, given the breadth of the principle that would be established by a grant of the Ameritech motion.

[55] According to the Department of Justice, in negotiations with Ameritech that company indicated that shared switching arrangements might be offered to commonly-owned buildings throughout an exchange area, to a single business with multiple locations, or to an organization composed of multiple users (*e.g.*, a bank clearing house on behalf of all of its member banks). As the Department correctly points out, an arrangement under which a Regional Company provided interexchange services to multiple users at diverse locations from a centrally located switch would be an exact reconstruction at the regional level of the pre-divestiture structure of the Bell System. Department of Justice Memorandum of June 29, 1984 at 27-28.

That this scenario is not an implausible one is demonstrated by Ameritech's own submission to the Court. In one of its memoranda,[56] Ameritech states:

> Shared-services arrangements can also be provided for building complexes, such as a university campus or an office park. In addition, large individual businesses and institutions may have some of the same economies of scale and centralized management advantages as shared systems because of their heavy usage of telecommunications and related products and services. If desired by these individual customers, Ameritech would provide equivalent packages of products and services.

Whatever one might think of the desirability of such an arrangement in the abstract, it is apparent that, given the historical experience with manipulation and discrimination by those in control of monopoly bottlenecks in the telecommunications market, it is not one to be repeated in slightly different form. See Part I, *supra*. In any event, such a development would be clearly violative of the decree.

D. *Marketing of Customer Premises Equipment*

As part of their arguments in support of the motion, the Regional Companies complain that, should they not be permitted to engage in the desired activities, they would have difficulty selling CPE,[57] a market from which they are not foreclosed by the decree.[58] For the reasons

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[56] Memorandum of March 23, 1984 at 3-4, n.*.

[57] Ameritech Motion to Provide Shared Tenant Services at 5, 8-9, 15; US West Comments in Support of Ameritech's Motion to Provide Shared Tenant Services at 8-10.

[58] Similar arguments are advanced by the Regional Companies in support of the other motions before the Court. As explained in Part IV, if these arguments were accepted as valid, they would

cited above, even if this were true,[59] it would be insufficient to override the direct prohibitions in the decree. But the CPE argument is not persuasive in any event.

The most the Regional Companies could hope for in this context would be the striking by the Court of some kind of balance. On one side of that balance would be the assumed possibility that, because of their absence from the shared tenant services market, the Regional Companies would find it marginally more difficult to market some kinds of CPE. This difficulty, in turn, could in theory have two adverse effects: it could reduce the income and profits of these companies, and it could reduce competition in the CPE market.

When these assumed effects are analyzed, however, they are seen to have little weight. Judged by any yardstick, the Regional Companies appear to be doing exceedingly well: their income, profits, and dividends have been rising steadily, and they are prospering probably beyond their own expectations—certainly beyond the expectations of financial analysts who contemplated their future course at the time of the breakup.[60] The short of it is that the companies do not urgently need the additional income that could be generated by their entry into the prohibited markets.

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result in a wholesale entry of the Regional Companies into prohibited businesses, all on the premises that this was necessary to protect their legitimate business enterprises. See pp. 53-54 *infra*.

[59] According to some, the opposite is true. MCI contends that the markets for shared tenant services and for CPE are entirely different. MCI Opposition to Ameritech's Shared Tenant Motion at 5. Further, MTTA states that independent competitors are significantly disadvantaged in the sale of both CPE and shared tenant services when compared with Regional Companies. MTTA Comments at 6. Only a record compiled in the context of an application for a decree modification or for a waiver could reveal which of these assertions is correct.

[60] See, *e.g.*, *Financial World*, Jan. 7, 1986 at 57; *New York Times*, November 29, 1985, Section D at 6.

The second prong of the companies' argument is equally weak. The information services market is hardly a monopoly market: a number of corporations engage in this business, both large and small, and the entry of the Regional Companies is not needed to make it a competitive one.

That is not to say that there would be *no* advantages flowing from the companies' entry into this market; but any such positive developments must be measured against the dangers. As elaborated on above, and as the several successful lawsuits against the old Bell System confirm, there is a serious danger that, when a company mixes both monopoly and competitive enterprises in closely related fields of business, the twin perils of discrimination and cross-subsidization are ever present. It is, of course, for that very reason that the decree prohibits such mixing (see Part I, *supra*) and for that reason, too, the CPE business may not be used as a springboard for opening the door to markets which are closed to the Regional Companies by the decree.

For the reasons stated, the Court rejects the request that the decree be "clarified" to permit that which, absent a modification or a waiver, it plainly prohibits. The Ameritech motion will therefore be denied.

III

Exchange Telecommunications Outside Regions

Three of the motions raise the same issue [61]—whether the decree permits the Operating Companies to provide

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[61] Ameritech's motion for clarification of the decree regarding the provision of cellular radio services outside the Ameritech region; the motion of Pacific Telesis group for a declaratory ruling that it may provide exchange telecommunications outside of California and Nevada; and the motion of NewVector Communications, Inc., a subsidiary of US West, for a ruling that NewVector's provision of

cellular exchange radio services outside the area served by Operating Companies owned by US West is authorized under the decree. These three motions thus raise similar issues with respect to the interpretation of the decree.

Despite this similarity, US West has insisted that both its views and those of its subsidiary NewVector cannot be properly presented unless each is allowed oral argument through its own counsel. NewVector Motion to Participate in Oral Argument at 6-7; US West Statement of August 14, 1985 at 1. The point is totally without merit.

NewVector has filed a twenty-two page memorandum in support of its motion; a twelve page reply to responses made to the Ameritech motion, with thirty pages of attachments; a seven page reply to responses to its own motion, and an eight page motion requesting leave to participate in the oral hearing, which reiterates the substantive position stated in the other memoranda. US West has filed an eighteen page memorandum in support of Ameritech's motion for shared tenant services with five pages of attachments; a twenty page reply to comments made on that motion; and a seventeen page post-hearing statement—all on the same subject and with reasoning similar or identical to the NewVector submissions. Indeed, the various Regional Companies and their subsidiaries have filed a total of twenty-seven memoranda on the pending motions, all making essentially the same points.

As the Court has noted in the past, all motions and written memoranda and comments are carefully scrutinized on their own merits, and of course it has done so here. The Court schedules oral argument when it concludes that such argument may serve a useful purpose in clarifying issues discussed in the memoranda. See also, Rule 1-9(g) of the Local Rules of this Court. Where, as here, the Regional Companies are arguing from substantially the same legal position and have exhaustively briefed the issues, it would be a waste of the time of Court and counsel to permit each company to argue separately, and the Court has declined to do so here (just as has done in the past). The current motions were argued in support of the Regional Company positions by counsel for Ameritech and counsel for Pacific Telesis, in conformity with selections made by the Regional Companies themselves. Counsel for the United States and for MCI argued in rebuttal, with a brief oral comment from counsel for AT & T.

There is thus no basis for the US West insistence that it should have been heard through oral argument, let alone for its complaint that it had found it "discomforting to be precluded from oral argument while a non-party, MCI," was invited to present its views.

exchange telecommunications services outside their particular exchange areas.[62] While the immediate impetus for these requests is the interest of some of the Regional Companies in competing on a nationwide basis in the cellular radio market, the scope of the motions is far broader: it encompasses all exchange telecommunications services.[63] The Court holds that, absent a waiver, each Operating Company may under the decree provide exchange telecommunications services, including cellular radio services, only within its own exchange area.

Section II(D) of the decree prohibits the Operating Companies from providing any product or service other than exchange telecommunications services and exchange access.[64] The Regional Companies subscribing to the motions argue[65] that the service they are proposing to

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US West Statement of August 14, 1985 at 1. MCI was allowed to argue orally because, in addition to the Department of Justice, it was the principal opponent of the requests made by the seven Regional Companies. The Court has no intention of complying with the request implicit in US West's complaint that it entertain oral argument from the seven Regional Companies and their subsidiaries and affiliates while precluding a response from those "non-parties," *i.e.*, intervenors, which are affected by the various Regional Company requests.

[62] Indeed, the claim is that the Regional Companies may provide this intra-LATA service outside their own regions.

[63] See, *e.g.*, NewVector Motion to Provide Cellular Service Outside of Region at 5 n. 10.

[64] Also listed in the decree is any other service "that is not a natural monopoly service actually regulated by tariff." Section II(D)(3).

[65] Some of the arguments made by the Regional Companies on this issue are actually couched in waiver, not clarification, terms (NewVector Memorandum at 12) ("cellular radio . . . should not be unnecessarily restricted"), or they are totally irrelevant (NewVector Memorandum at 19-21) (contending that the consent decree approved by the Court in a different case—*United States v. GTE*—somehow supports the request for clarification of the decree in this case).

perform constitutes exchange telecommunications, and that for purposes of the decree it is irrelevant that this service would be provided outside the exchange areas—inherited by the particular Operating Companies by virtue of the decree. However, it is clear for a number of reasons that the Operating Companies were intended to be limited to their own local areas in furnishing exchange telecommunications services.[66]

First. Section IV(G) of the decree defines the nature of the exchange areas as being strictly local by mandating their establishment in accordance with a number of criteria, all of them of a local character.[67] Under the same section, the responsibility for establishing each exchange area is that of the Operating Company servicing the particular area—a provision that supports the con-

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[66] The Court has previously held that the prohibition on mobile radio services which cross exchange area boundaries may be removed only through a waiver proceeding. *United States v. Western Electric Co., supra,* 578 F.Supp. at 645-46; see also, *United States v. Western Electric Co., supra,* 604 F.Supp. at 256 *et seq.*

[67] Section IV(G) provides that "exchange area" or "exchange" means a geographic area established by an Operating Company in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with the approval of the Court, no exchange area located in one State shall include any point located within another State.

clusion that these companies were not intended to provide exchange services outside their own territorial limits. Likewise, section II(D)(3) of the decree authorizes the Operating Companies to provide, in addition to exchange telecommunications and exchange access service, other natural monopoly services "actually regulated by tariff," again indicating that the decree contemplates the provision by an Operating Company of services under that section only in the area in which it is regulated by tariff; *i.e.*, its "home" area.

Second. The parties' submissions and the Court's decisions with respect to the appropriate size of the exchange areas were based on factors relating solely to the status of the "home" Operating Company [68]—a definitional process that would have been largely devoid of meaning if the Operating Companies had been intended to have nationwide reach with respect to exchange areas.

Similar reasoning was applied to the Bell System's assets. To the extent that they were not awarded to AT & T, these assets were divided among the local companies on the basis of the principle that each Operating Company would provide telecommunications services only in the exchange areas in which it was the dominant telecommunications provider.

Third. When describing the structural changes that would take place following the separation of the Operating Companies from AT & T, the Court stated in the Opinion which approved and explained the decree that "[t]he geographic area for which these Operating Companies would provide local telephone service is defined in the proposed decree by a new unit, the 'exchange area'," [69] and in the Opinion which approved the Plan of

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[68] *United States v. Western Electric Co., supra,* 569 F.Supp. at 995-97.

[69] *United States v. AT & T, supra,* 552 F.Supp. at 141. See generally, *United States v. ITT Continental Baking Co.,* 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975).

Reorganization that "[w]ith respect to exchange telecommunications . . . the Operating Companies and the Regional Companies [are] by definition . . . limited to clearly defined geographic areas." [70] Further, in comparing the Bell System before divestiture to the telecommunications industry as it would exist after divestiture, the Court noted that:

> The Bell System is a vast, vertically integrated company which dominates local telecommunications, intercity telecommunications, telecommunications research, and the production and marketing of equipment. Each of the divested Operating Companies will have a monopoly in only one geographic portion of one of these markets—local telecommunications.[71]

Fourth. The regional and local companies themselves have repeatedly espoused the view that the scope and character of their exchange operations were to be geographically limited. Thus, on May 25, 1983, the Associated Bell System Companies stated in a filing before the Federal Communications Commission that "[n]one of the divested [Operating Companies or Regional Companies] will have control over exchange facilities on a broad national basis. No [Regional Company] will have more

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[70] *United States v. Western Electric Co., supra,* 569 F.Supp. at 1081.

[71] 552 F.Supp. at 187. The Court thereafter consistently adhered to these interpretations. For example, in deciding that the decree did not permit the Operating Companies to provide "any and all mobile radio services without regard to LATA boundaries," it noted that this proposal would permit telephone users to route long distance calls over either the landline interexchange networks or over a mobile radio system, "thus in effect overriding on a large scale the decree's limitations on the territorial reach of the Operating Companies. Such a development would have been entirely inconsistent with the terms and purposes of the decree, and the Court would not have authorized it." *United States v. Western Electric Co., supra,* 578 F.Supp. at 647.

than regional ownership of such facilities. . . ." [72] Similar statements were made by individual Operating Companies, including a statement subscribed by several of them that "[u]nder the AT & T Plan of Reorganization (POR), approved by the Department of Justice and the Divestiture Court, the Bell System has been divided both geographically and functionally. Each divested BOC will serve a territory which is sharply confined." [73]

The oft-repeated assertion of the local companies that they are geographically limited was adopted by the FCC in a Report and Order which stated that "[a]t least with respect to the provision of exchange telecommunications services, exchange access and information service access, the [Regional Companies] will operate only within their own geographic territories. The [decree] does not prohibit the [Operating Companies] from offering CPE outside the geographic area in which they provide exchange telecommunications services." [74]

In the face of the statements made to and by their federal regulatory body, the Court finds disingenuous the

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[72] Reply Comments of Associated Bell System Companies, before the Federal Communications Commission in the matter of Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies, CC Docket No. 83-115 (May 25, 1983) at 13 (footnotes omitted).

[73] Joint Petition for Reconsideration of Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, the Ohio Bell Telephone Company, before the Federal Communications Commission in the matter of Policy and Rules concerning the furnishing of customer premises equipment, enhanced services and cellular communications services by the Bell Operating Companies, CC Docket No. 83-115 (February 10, 1984) at 13. See also Reply Comments of Associated Bell System Companies before the FCC, *supra*, at 13-18.

[74] 49 Fed.Reg. 1190, 1192 (January 10, 1984).

present claims of these companies: They have always clearly shared the understanding of the Court that, with respect to exchange services, they were to be strictly local entities, not national corporations providing such services everywhere.

Fifth. Even arguments advanced here by the Regional Companies support this construction. Ameritech and others cite the fact that they are not limited to prescribed geographical territories with respect to the provision of directory advertising or customer premises equipment.[75] But these activities are permitted to the local companies on an unlimited geographic basis by an amendment of the consent decree.[76] Thus, the directory advertising and CPE marketing exemptions, rather than buttressing the position of the Regional Companies, undercut it: If a special amendment to the decree was required to allow them to engage in these enterprises on such a basis, they can hardly be deemed to be free to engage in other "outside" ventures without a similar amendment (or a waiver of the line of business restrictions).[77]

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[75] Ameritech Motion to Provide Cellular Service Outside of Region at 5; Ameritech Reply Memorandum at 8; NYNEX Comments at 2 note **.

[76] Sections VIII(A), (B) of the decree.

[77] Likewise, to the extent that the Regional Companies are providing cellular radio to areas that do not correspond exactly to exchange boundaries (*e.g.*, New York-northern New Jersey) or that one of them is participating in the provision of cellular services in the Gulf of Mexico, they do so only pursuant to waivers, not as of right (*United States v. Western Electric Co., supra*, 578 F.Supp. at 647-49); *United States v. Western Electric Co., supra*, 604 F. Supp. at 263-64), and they have never previously claimed that they could do so as of right.

The Regional Companies argue that the Plan of Reorganization contemplated that they would engage in extraregional cellular

Sixth. The local companies have reaped substantial benefits from the interpretations they now seek to disavow. For example, in denying the Department of Justice's motion for reconsideration of the Court's ruling permitting the Operating Companies to market customer premises equipment, the Court noted that these companies

> will be relatively small, geographically dispersed corporations. They will be limited to a narrow range of products and services, . . . [and they] will also lack the ability to use various components and affiliates in the pursuit and concealment of anticompetitive conduct.[78]

Seventh. The conclusion that the local companies may not engage in exchange telecommunications outside their own areas is also supported by policy underlying the decree. In order to maintain a stable and effective national telecommunications network, the local companies must work cooperatively in many areas. Together they play an important role in the support of national security and

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operations because a footnote in the Plan (note 386 in Part II(A)(3)(b)(ii)) states that some cellular systems might be owned by joint ventures of Regional Companies in areas that do not necessarily correspond to the companies' regions. This statement, however, occurs in a section of the Plan concerned only with effecting the transfer of AT & T's assets to the Operating Companies, and it was thus referring only to a particular type of ownership arrangement which might be necessary to effectuate that transfer. In context, the footnote does not support the Regional Companies' argument, particularly since these joint ventures were eventually not necessary to effectuate the divestiture. In any event, nothing in the Plan indicates that the Regional Companies would not have had to obtain waivers prior to entering into a joint venture arrangement.

[78] *United States v. AT & T*, 1982-2 Trade Cases 64,980 (CCH 1982); see also, *United States v. Western Electric Co., supra*, 592 F.Supp. at 852 n. 8.

emergency preparedness functions, and they participate in the establishment of national network standards.[79] Competition among these companies with respect to exchange service could, and no doubt in short order would, reduce their incentive to cooperate in these vital areas and thus jeopardize both the quality of the services provided by the national telecommunications network as well as the national defense and emergency requirements of that network.

Eighth. The Regional Companies argue at great length that their entry into the cellular markets on a nationwide scale would not be anticompetitive but would promote competition.[80] However, even without the involvement of the Operating Companies in each others' exchange telecommunications, competition may be expected to flourish in the exchange areas as technology and economics render such competition by independent, non-monopoly competitors feasible.

In any event, to the extent that this argument has any validity, it should be made in support of an application for a waiver pursuant to section VIII(C) of the decree, not a request for clarification. This distinction is not a mere technicality. The grant of waivers may be conditioned by the Court upon provisions designed to protect competition. As applied to waiver applications for cellular operations, the Court might, for example, wish to explore the issue of the provision of "roaming" services

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[79] See *United States v. AT & T, supra,* 552 F.Supp. at 208-09; *United States v. Western Electric Co., supra,* 569 F.Supp. at 1113-14, 1118.

[80] See, *e.g.*, Ameritech Motion to Provide Cellular Service Outside of Region at 3, 13; Ameritech Reply in Support of Motion at 3-4; Southwestern Bell Memorandum in Support of Ameritech's Motion to Provide Cellular Service Outside of Region at 7-8.

to Regional Company customers [81] or the possibility that these companies could make use of the cellular footholds to construct national cellular service network or an official services networks,[82] and to attach appropriate conditions depending upon the results of the inquiry. If the decree were "clarified" to permit Regional Company entry into the cellular market on a nationwide scale, no such inquiries could be conducted and no necessary safeguards could be attached.

The response of the Regional Companies that waiver proceedings are unnecessary because "there is no conceivable threat to competition," [83] that they "would unnecessarily preoccupy the Court and the parties," [84] and that the dangers are "speculative," [85] are unsatisfactory, for they assume what only such proceedings can supply: the answer to the question, in accordance with section VIII(C) of the decree, whether competition could be impeded by these companies in the market they seek to enter.

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[81] Roaming is the ability of a cellular subscriber in one system to obtain cellular services in another system. Absent an arrangement between the customer's "home" cellular service provider and the provider in another cellular system, roaming may be either impossible or at least more expensive. Regional Companies may enjoy a competitive advantage in this regard because of the regional character of their monopoly wireline operations.

[82] See Response of Telocator Network of Ameritech's Motion to Provide Cellular Services Outside of Region at 6-9; MCI Opposition to Ameritech's Motion to Provide Cellular Services Outside of Region at 6.

[83] Ameritech's Reply in Support of Motion to Provide Cellular Services Outside of Region at 13.

[84] NewVector Motion to Provide Cellular Services Outside of Region at 4.

[85] NewVector Reply to Responses to Ameritech's Motion to Provide Cellular Service Outside of Region at 8.

For the reasons stated, the Court will not approve the "clarification" of the decree the Regional Companies request,[86] and the motions will be denied.[87]

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[86] By a letter dated December 19, 1985, Ameritech asserts that, in a motion filed on December 9, 1985, for a waiver of the decree regarding the application of Pacific Telesis to provide certain mobile radio services, the Department of Justice agreed with Ameritech's substantive arguments regarding the instant motion except only as to the necessity of a waiver. The Ameritech submission does not cause a change in the Court's decision announced herein, for several reasons.

In the first place, Ameritech has stated its position in a letter rather by a motion as required under the Rules, and in contravention of the Court's Memorandum dated September 27, 1983. In accordance with that Memorandum, the Court declines to grant leave to file the December 19 letter but has ordered the Clerk to return it to its author. Further, while the Court gives substantial weight to the position of the Department of Justice (see *United States v. Western Electric Co., supra*, 604 F.Supp. at 262; see also, 592 F.Supp. at 873), the responsibility for interpreting the decree is the Court's, not the Department's, and the Department's views, although always regarded as persuasive, are not binding on the Court. Finally, Ameritech's own memorandum interprets the Department of Justice's position to be that the decree does not permit the Regional Companies to provide cellular service outside the appropriate exchange areas or to provide voice storage service in their cellular networks without a waiver. Ameritech Motion to Provide Cellular Services Outside of Region at 2-3.

[87] There is a suggestion in several of the papers submitted to the Court that some Operating Companies may be engaged in the cellular business outside their own exchange areas without having secured the necessary waivers. See, *e.g.*, Ameritech Reply Memorandum at 8-9; Pacific Telesis Memorandum in Support of Pacific Telesis' Motion at 9; Bell Atlantic Motion to Provide Cellular Services Outside of Region at 2. To the extent that this is so, the offending companies must, of course, cease such operations forthwith. Furthermore, the Court herewith requests the Department of Justice to investigate whether such violations have occurred, and if the answer is in the affirmance, to recommend appropriate sanctions to the Court. See sections V, VI, and VII of the decree.

IV

Voice Storage

Ameritech [88] has also moved for an order declaring that the decree permits it to provide voice storage and retrieval features in conjunction with the provision of cellular radio services.[89] The issues presented by this motion are in some respects an amalgam of the questions discussed in Parts II and III above: as they do with respect to shared tenant services, the Regional Companies claim that they are not prohibited from engaging in the voice storage and retrieval business as such; and, as they assert with respect to the cellular services, they argue that they are free to provide voice storage and retrieval services outside their own regions.

Section II(D)(1) of the decree unambiguously states that "no [Operating Company] shall, directly or through any affiliated enterprise . . . provide . . . information services." Information services are defined in section IV(J) as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications. . . ." [90] As Ameritech

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[88] Ameritech's motion is supported by NYNEX, BellSouth, and Southwestern Bell.

[89] Ameritech defines voice storage as an optional feature that enables a cellular subscriber to store, retrieve, and send messages when his cellular telephone is busy or unattended. Ameritech Motion to Provide Voice Storage at 16.

[90] An exception exists with respect to the "use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." Section IV(J) of the decree.

itself has recognized[91] voice storage and retrieval services fall squarely within this definition.[92]

Since voice storage is an information service, and since the Regional Companies are clearly prohibited from providing any information service, there is no basis for a clarification motion: no "clarification" of the decree could change those basic facts, and the motion could appropriately be denied on that basis alone.

What Ameritech is really seeking, it would seem, is an order to remove the information restriction in section II(D). However, that result can be achieved only by a request for modification[93] which might require compliance with the standard established by such decisions as *United States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971), or by a motion for a waiver which makes the showing required by section VIII(C)—a motion which Ameritech has chosen not to file.

Notwithstanding these considerations, the Regional Companies contend that they may legitimately market voice storage and retrieval services without either a mod-

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[91] Ameritech's Motion to Provide Voice Storage refers to the service as being encompassed within the "information services prohibition." Memorandum at 9. Further, Ameritech's counsel conceded at oral argument that, were the services provided in connection with the landline network, their offering by a Regional Company would be prohibited by the decree. Transcript of hearing of August 9, 1985 at 46.

[92] In fact, the Justice Department's Competitive Impact Statement used voice storage as an example of the kind of information service that would be prohibited under the decree. Competitive Impact Statement, *supra*, 47 Fed.Reg. at 7176.

[93] US West, for one, appears to recognize that fact (US West Statement of August 14, 1985 at 16), and, implicitly, so does Ameritech when it requests that the Court "reverse the possible competitive [sic] effect of the information services prohibition". Ameritech Motion at 9.

ification or a waiver because, as they see it, the "decree's information services prohibition was intended to apply to services provided over the operating companies' land-line networks, not to services provided over competitive networks such as cellular radio." [94]

The basis for the companies' conclusion is not clear. Certainly, it could not rest on language in the decree, for the language contains no such exception. Similarly, that conclusion could not have been derived from any expression of intent by the Court in the 1982 Opinion which explained the decree [95] or by the Department of Justice which performed a like service in its Competitive Impact Statement. Instead, the companies simply assert that the prohibition cannot be deemed to apply to the marketing of services in a competitive environment because the monopoly-competition dichotomy, so it is claimed, forms the basic structure of the decree.[96]

That view of the decree is not only overly simplistic; it is quite wrong. The Regional Companies are not merely prohibited from providing certain types of serv-

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[94] Ameritech Motion to Provide Voice Storage at 5-6; see also, Memorandum of Southwestern Bell in Support of Ameritech's Motion to Provide Voice Storage at 3-4. Ameritech appears to contend that the Court could make the finding implied by its argument in the context of a request for clarification as distinguished from a waiver motion. Whatever may be the technical appellation of a particular motion, the movant would still have to demonstrate the existence of the condition prescribed by section VIII(C)—that there is no substantial possibility that the movant could use its monopoly power to impede competition in the market it seeks to enter, and the Court would still be required to attach such conditions as would be appropriate to achieve the results required by that section.

[95] Nor could it have been derived from any other Opinion of the Court.

[96] See, *e.g.*, Ameritech Motion to Provide Voice Storage at 6-7; Ameritech Reply Memorandum in Support of Motion to Provide Voice Storage at 3-5; NYNEX Comments in Support of Ameritech's Motion to Provide Voice Storage at 2-3.

ice depending upon whether the services are in the monopoly or the competitive category;[97] they are prohibited from providing *any* product or service other than those which they are explicitly permitted to market. Since the time the consent decree was modified at the request of the Court, and since the time the Court granted a number of waivers to the Regional Companies, the conceptual neatness advocated at one time by the Department of Justice has disappeared.[98] The Regional Companies now legitimately engage in the monopoly services represented by exchange telecommunications and exchange access pursuant to the original consent decree; in the marketing of two competitive services (CPE and Yellow Pages) in accordance with the decree as modified at the request of the Court; and in the provision of a number of other competitive products and services as permitted pursuant to waivers granted by the Court.

What does remain clear is that the Regional Companies may not provide any product or service—other than those enumerated in sections II(D)(3), VIII(A) and VIII(B)—unless they are authorized to do so by a modification of the decree or by a waiver pursuant to section VIII(C). No Regional Company is attempting in the current motions before the Court to avail itself of either of these remedies.

Moreover, it is not at all certain that the Regional Companies could make the showing required by section VIII (C) with respect to voice storage and retrieval. As the

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[97] To be sure, as discussed in Part I, *supra*, the decree rests in large part on the need to keep bottleneck monopolists out of competitive markets where their monopoly could afford them an undue advantage. However, as indicated below, it does not follow that a claim of absence of such an advantage is sufficient to override specific decree prohibitions.

[98] Compare Bell Atlantic Memorandum in Support of Pacific Telesis' Motion at 12.

Court has previously noted,[99] part of the reason for barring the Operating Companies from entry into the information services market was to allow competition to develop in that market without hindrance from monopolists. Although the cellular radio market may be competitive, each Operating Company retains a monopoly in its local exchange market, and the presence of these companies on a broad scale in a market closely related to that in which they retain such a monopoly raises some of the very concerns that led to the information and adoption of the decree.[100]

Moreover, the generation of incentives to the Regional Companies to design their local networks in such a manner as to accomodate the maximum number of information service providers was one of the stated reasons for the imposition of the information services prohibition.[101]

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[99] *United States v. AT & T, supra,* 552 F.Supp. at 188-89.

[100] For that reason, among others, the Court rejects the contention that the cellular market presents a competitive situation where "technological developments and different market structures negate the purpose and reverse the possible competitive effect of the information services prohibition." Ameritech Motion to Provide Voice Storage at 9. Only a request for modification or for waiver can provide the context for an exploration of that contention as well of other issues, such as the questions raised by Associated Telephone Answering Exchanges, Inc. Response of ATAE at 7-8.

[101] *United States v. AT & T, supra,* 552 F.Supp. at 189-90. See also, *United States v. Western Electric Co., supra,* 578 F.Supp. at 659 n. 4, where the Court stated that

> This prohibition is necessary because the Operating Companies would have both the incentive and the ability to discriminate against competing information providers either by granting more favorable access to the local network to their own information services or by subsidizing their services with revenues from the local exchange monopoly. Moreover, the prohibition against providing information services gives Operating Companies an incentive to design their local networks to accomodate the maximum number of information service providers.

On this basis, as the Department of Justice correctly points out,[102] the decree's requirement that the Operating Companies provide nondiscriminatory information access applies equally to the activities of their cellular subsidiaries.

As for Ameritech's concern that it would lose its cellular customers if it could not supply such a service,[103] it is no more persuasive than is the argument made in another motion that the Regional Companies will lose CPE market share if they are not also permitted to enter the shared tenant services business (see pp. 1103-1104, *supra*). The decree simply does not contemplate that the Regional Companies may use claims of inability to compete[104] with respect to the services they are permitted to provide as levers for prying open markets that are prohibited to them. The Regional Companies' fear of loss of cellular customers is best alleviated by their design of their cellular systems to maximize access of voice storage providers to the cellular network, rather than by attempts to circumvent the decree's purpose through a "clarification" of section II(D)(1).

Ameritech's final substantive argument[105]—that the Regional Companies should be able to provide this service

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[102] Response of the United States to Ameritech's Voice Storage Motion at 6-10.

[103] Ameritech Reply Memorandum at 17. The other Regional Companies (BellSouth, Southwestern Bell, and NYNEX) make similar arguments.

[104] These claims are, of course, not supported by any record made in the context of a waiver application, and they may well turn out to be erroneous.

[105] Ameritech makes two additional points which deserve only brief mention.

First, the company claims that its position on information services in the cellular market is supported by this Court's decision of November 1, 1983 authorizing service beyond exchange boundaries by cellular carriers. Memorandum at 8, 13. See *United States v.*

because AT & T is permitted to supply information services [106]—is frivolous. AT & T no longer provides monopoly services [107]—it is engaged in the competitive marketplace, and for that reason it is not subject to the restrictions which the decree imposes on the Operating Companies which continue to hold local telephone monopolies.[108] To seek to equate the present AT & T with the

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Western Electric Co., supra, 578 F.2d at 652-53. This argument is incorrect for the reasons cited in notes 25 and 77, *supra.*

Second, the Regional Companies argue that there is no threat of anticompetitive behavior in the cellular voice storage market because they are required by the Court and the FCC to afford competitors interconnections on the same terms and conditions they afford to their own cellular subsidiaries (Ameritech Motion to Provide Voice Storage at 10 n. *; Ameritech Reply Memorandum at 11 n. *), and because their cellular operations are operated by separate subsidiaries (Comments of BellSouth in Support of Ameritech's Voice Storage Motion at 3).

The Bell System was under an interconnection obligation with respect to the services it provided, yet there was evidence that it did not consistently abide by its responsibilities in that regard. *See United States v. AT & T, supra,* 524 F.Supp. at 1348. This lawsuit accordingly became necessary, and so did the decree in this case. The Court therefore will not rely on injunctive remedies alone. See *United States v. AT & T, supra,* 552 F.Supp. at 167-68. Likewise, the separate subsidiary requirement, while helpful, is obviously not adequately by itself to override the prohibitions in the decree and the dangers that gave rise to their formulation and adoption.

[106] Transcript of hearing of August 9, 1985 at 46; Ameritech Motion to Provide Voice Storage at 8; see also, Reply Comments of US West on the Shared Services Motion at 8.

[107] To be sure, AT & T still maintains a very high share in the interexchange market. However, with the arrival across the nation of equal access, as well as for other reasons, that market share is diminishing. In any event, AT & T is faced with significant competition in its markets; the Regional Companies remain de jure and de facto regulated monopolies.

[108] See also, *United States v. Western Electric Co., supra,* 578 F.Supp. at 659 n. 6.

Regional Companies not only flies in the face of the language of the decree but also contradicts the thousands of words which have been written since that decree was issued—by the Court, by the parties, by the Regional Companies themselves, and by numerous intervenors. Ameritech's attempt to equate the two situations thus serves only to highlight the fundamental flaws in its argument. See note 19, *supra*.

For the reasons stated, it is this 13th day of January, 1986 ORDERED that all the motions be and they are hereby denied.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 74-1698, 82-0192
Misc. No. 82-0025 (PI)

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Aug. 11, 1982

Modification of Final Judgment
Aug. 24, 1982

Judgment Affirmed Feb. 28, 1983
See 103 S.Ct. 1240

D. *Participation of the Bell Operating Companies*

Many persons and organizations have questioned the lack of independent representation for the Operating Companies in this proceeding, both prior to the entry of judgment and in conjunction with the preparation of the plan of reorganization. They contend that AT & T's interests under the proposed settlement are diametrically opposed to those of the Operating Companies, and that AT & T therefore cannot be relied upon to act in the Operating Companies' best interests. They suggest that, for these reasons, the Court should ensure the proper representation of the Operating Companies either by divesting them immediately or by appointing a guardian *ad litem* or similar officer to represent their interests. Such participation will not be ordered at this stage of the proceedings, both because it is not necessary, and, more fundamentally, because there is no practical means for effecting it.

First. It is not at all clear that AT & T will act contrary to the interests of the Operating Companies. Under the proposed decree, AT & T's shareholders will become the shareholders of the Operating Companies and, should AT & T act to undermine the interests of these Companies or fail appropriately to protect them, it and

its managers might be liable civilly for breach of their fiduciary duty to these shareholders. See Part IX *supra*. Moreover, since the divested Operating Companies will supply AT & T's sole avenue of access to telephone subscribers and will potentially be large purchasers of Western Electric equipment, AT & T has additional incentives to protect their interests.

Second. The views which the Operating Companies might be expected to espouse have substantially been presented in this proceeding. With respect to all of the issues which presumably would concern the Operating Companies—principally the distribution of the assets and the corporate debt, the restrictions on Operating Company operations, the Operating Company access requirements—able parties with able counsel have presented to the Court the factual, legal, and policy arguments bearing upon these questions. In the main, the Operating Companies would have no particular expertise that would give special value to their participation: the Court's decision generally rests upon the rationale of improved competition, and the relevant information on that subject is available to those who are now before the Court. That is not to say, certainly, that the Operating Companies, if they had independent representation, would not make a contribution; obviously they could and would. But in the opinion of the Court that contribution is not so critical as to outweigh the adverse factors recited below.

Third. There is no existing procedural mechanism which would lend itself to the expression of the views of the Operating Companies. Two alternatives have been advanced: an immediate spin-off of the Operating Companies so as to enable them to bargain with AT & T and the Justice Department concerning the terms of the proposed decree, and the appointment of a guardian or trustee to represent their interests in this and future proceedings.

An immediate spin-off of the Operating Companies, while superficially appealing, would be entirely impractical and, notwithstanding the Court's urging, none of those who has advocated such a spin-off has presented a plan that is even remotely feasible. In fact, such an action would leave entirely unresolved all of the problems of administrative coordination, interconnection, and continuity of service that are addressed in the proposed decree.

For example, as a consequence of such a spin-off, the Operating Companies would be wholly independent of AT & T, required to provide to AT & T neither services nor assistance. At a minimum, this would leave AT & T at a serious disadvantage relative to competitors who have constructed their own complete networks among major cities;[373] at worst, this course would disrupt, for months or perhaps years, the nation's telecommunications network, with incalculable consequences to trade and defense, as well as to ordinary communication and interaction among citizens. At the same time, such a spin-off would leave local and interexchange facilities integrated under the common ownership of the Operating Companies, and it would thus be directly contrary to the antitrust objectives of these lawsuits. The Court will not attempt to catalogue all of the other problems and difficulties that would inevitably accompany a separation without advance planning or agreement similar to that embodied in the proposed decree; but there can be no question but that, in a separation of this magnitude, they would be manifold and in all likelihood insurmountable.[374]

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[373] The Operating Companies own most of the facilities necessary for the provision of interexchange service. See Exhibit D-24B-1011. The functioning of AT & T's Long Lines Department would be substantially impaired if the Operating Companies were divested intact.

[374] Much of the impetus for an immediate spin-off results from the belief that there should be arm's length bargaining regarding the

As indicated, beyond expressing the general expectation that all those matters may somehow be worked out, not one person or organization has even attempted to suggest practical solutions. For all these reasons, then, the Court has concluded that it will not require an immediate spin-off.

While the Court's power to appoint a guardian, trustee, or similar officer to represent the interests of the Operating Companies is far from clear, its rejection, again, must be bottomed primarily upon the practical difficulties inherent in this approach. If a guardian were appointed at this time, even before the plan of reorganization has been formulated, he could be expected to face considerable difficulty in obtaining the type of detailed information from the Operating Companies which would be the *raison d'etre* of his participation. The personnel of the Operating Companies and the information they possess would remain under the control of AT & T and it is unlikely that a guardian could secure sufficient assistance from them at this stage to warrant the disruption his appointment would entail. Development of an independent expertise by the guardian would be likely to take years, further delaying resolution of this litigation without the promise of any real benefits to the decision-making process.

Participation by the Operating Companies, through their own chief executive officers, will be appropriate, however, with respect to the process of implementation of the decree. At the time the plan of reorganization is presented, the seven new regional Operating Companies and their chief executives will be a long way on the road toward independence, with a substantial incentive to rep-

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valuation of the assets being divided between AT & T and the Operating Companies. That argument in favor of an immediate spin-off is meritless, however, because the Court has concluded that net book value rather than market value is the appropriate standard for this division. See Part IX *supra*.

resent and advocate their own interests. Moreover, their familiarity with the facilities required to provide local and intercity service and exchange access would give them special expertise concerning the adequacy of the reorganization plan in regard to the division of assets.

The Court accordingly intends to require that, at the time the plan of reorganization is submitted to the Court by the Department of Justice, the designated chief executive officers of the seven regional Operating Companies file with the Court sworn statements certifying that, to the best of their knowledge, the plan will leave the companies which they head as viable entities with the resources necessary to perform the functions described in the decree. These statements will also be expected to discuss any element of the plan of reorganization that may have been imposed by AT & T over the objections of any chief executive officer.[375] The Court expects, additionally, to call upon the chief executive officers or their staffs to participate in other respects as well in the proceedings held at the time the plan of reorganization is presented for judicial approval.

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[375] In order to enable the Court to assess the weight to be accorded to the statements of these individuals, they will also be invited, but not required, to reveal any continuing relationship.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 74-1698, 82-0192
Misc. No. 82-0025 (PI)

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., and
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants.

Aug. 11, 1982

Modification of Final Judgment

Aug. 24, 1982

Judgment Affirmed Feb. 28, 1983
See 103 S.Ct. 1240

MODIFICATION OF FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 14, 1949; the defendants having appeared and filed their answer to such complaint denying the substantive allegations thereof; the parties, by their attorneys, having severally consented to a Final Judgment which was entered by the Court on January 24, 1956, and the parties having subsequently agreed that modification of such Final Judgment is required by the technological, economic and regulatory changes which have occurred since the entry of such Final Judgment;

Upon joint motion of the parties and after hearing by the Court, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Final Judgment entered on January 24, 1956, is hereby vacated in its entirety and replaced by the following items and provisions:

I

AT & T Reorganization

A. Not later than six months after the effective date of this Modification of Final Judgment, defendant AT & T shall submit to the Department of Justice for its ap-

proval, and thereafter implement, a plan of reorganization. Such plan shall provide for the completion, within 18 months after the effective date of this Modification of Final Judgment, of the following steps:

1. The transfer from AT & T and its affiliates to the BOCs, or to a new entity subsequently to be separated from AT & T and to be owned by the BOCs, of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT & T, exchange telecommunications and exchange access functions, including the procurement for, and engineering, marketing and management of, those functions, and sufficient to enable the BOCs to meet the equal exchange access requirements of Appendix B;

2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange access functions and those relating to other functions (including the provision of interexchange switching and transmission and the provision of customer premises equipment to the public); provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT & T and the BOCs and other subsidiaries and the Standard Supply Contract between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT & T by means of a spin-off of stock of the separated BOCs to the shareholders of AT & T, or by other disposition; provided that nothing in this Modification of Final Judgment shall require or prohibit

the consolidation of the ownership of the BOCs into any particular number of entities.

B. Notwithstanding separation of ownership, the BOCs may support and share the costs of a centralized organization for the provision of engineering, administrative and other services which can most efficiently be provided on a centralized basis. The BOCs shall provide, through a centralized organization, a single point of contact for coordination of BOCs to meet the requirements of national security and emergency preparedness.

C. Until September 1, 1987, AT & T, Western Electric, and the Bell Telephone Laboratories, shall, upon order of any BOC, provide on a priority basis all research, development, manufacturing, and other support services to enable the BOCs to fulfill the requirements of this Modification of Final Judgment. AT & T and its affiliates shall take no action that interferes with the BOCs' requirements of nondiscrimination established by section II.

D. After the reorganization specified in paragraph I(A)(4), AT & T shall not acquire the stock or assets of any BOC.

II

BOC Requirements

A. Subject to Appendix B, each BOC shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT& T and its affiliates.

B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:

1. procurement of products and services;

2. establishment and dissemination of technical information and procurement and interconnection standards;

3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

C. Within six months after the reorganization specified in paragraph I(A)(4), each BOC shall submit to the Department of Justice procedures for ensuring compliance with the requirements of paragraph B.

D. After completion of the reorganization specified in section I, no BOC shall, directly or through any affiliated enterprise:

1. provide interexchange telecommunications services or information services;

2. manufacture or provide telecommunications products or customer premises equipment (except for provision of customer premises equipment for emergency services); or

3. provide any other product or service, except exchange telecommunications and exchange access service, that is not a natural monopoly service actually regulated by tariff.

III

Applicability and Effect

The provisions of this Modification of Final Judgment, applicable to each defendant and each BOC, shall be binding upon said defendants and BOCs, their affiliates, successors and assigns, officers, agents, servants, employees,

and attorneys, and upon those persons in active concert or participation with each defendant and BOC who receive actual notice of this Modification of Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Modification of Final Judgment are carried out. Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission by, or an estoppel against any party or BOC. The effective date of this Modification of Final Judgment shall be the date upon which it is entered.

IV

Definitions

For the purposes of this Modification of Final Judgment:

A. "Affiliate" means any organization or entity, including defendant Western Electric Company, Incorporated, and Bell Telephone Laboratories, Incorporated, that is under direct or indirect common ownership with or control by AT & T or is owned or controlled by another affiliate. For the purposes of this paragraph, the terms "ownership" and "owned" mean a direct or indirect equity interest (or the equivalent thereof) of more than fifty (50) percent of an entity. "Subsidiary" means any organization or entity in which AT & T has stock ownership, whether or not controlled by AT & T.

B. "AT & T" shall mean defendant American Telephone and Telegraph Company and its affiliates.

C. "Bell Operating Companies" and "BOCs" mean the corporations listed in Appendix A attached to this Modification of Final Judgment and any entity directly or indirectly owned or controlled by a BOC or affiliated through substantial common ownership.

D. "Carrier" means any person deemed a carrier under the Communications Act of 1934 or amendments thereto, or, with respect to intrastate telecommunications, under the laws of any State.

E. "Customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications, but does not include equipment used to multiplex, maintain, or terminate access lines.

F. "Exchange access" means the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Exchange access services include any activity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area, and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC. Such connections, at the option of the interexchange carrier, shall deliver traffic with signal quality and characteristics equal to that provided similar traffic of AT & T, including equal probability of blocking, based on reasonable traffic estimates supplied by each interexchange carrier. Exchange services for exchange access shall not include the performance by any BOC of interexchange traffic routing for any interexchange carrier. In the reorganization specified in section I, trunks used

to transmit AT & T's traffic between end offices and class 4 switches shall be exchange access facilities to be owned by the BOCs.

G. "Exchange area," or "exchange" means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;

2. every point served by a BOC within a State shall be included within an exchange area;

3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and

4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

H. "Information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or other symbols.

I. "Information access" means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identifica-

tion, carrier access codes, testing and maintenance of facilities, and the provision of information necessary to bill customers.

J. "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

K. "Interexchange telecommunications" means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.

L. "Technical information" means intellectual property of all types, including, without limitation, patents, copyrights, and trade secrets, relating to planning documents, designs, specifications, standards, and practices and procedures, including employee training.

N. "Telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services.

O. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, by means of electromagnetic transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

P. "Telecommunications service" means the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities.

Q. "Transmission facilities" means equipment (including without limitation wire, cable, microwave, satellite, and fiberoptics) that transmit information by electromagnetic means or which directly support such transmission, but does not include customer premises equipment.

V

Compliance Provisions

The defendants, each BOC, and affiliated entities are ordered and directed to advise their officers and other management personnel with significant responsibility for matters addressed in this Modification of Final Judgment of their obligations hereunder. Each BOC shall undertake the following with respect to each such officer or management employee:

1. The distribution to them of a written directive setting forth their employer's policy regarding compliance with the Sherman Act and with this Modification of Final Judgment, with such directive to include:

(a) an admonition that non-compliance with such policy and this Modification of Final Judgment will result in appropriate disciplinary action determined by their employer and which may include dismissal; and

(b) advise that the BOC's legal advisors are available at all reasonable times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to their employer a certificate in substantially the following form:

The undersigned hereby (1) acknowledges receipt of a copy of the 1982 *United States v. Western Electric* Modification of Final Judg-

ment and a written directive setting forth Company policy regarding compliance with the antitrust laws and with such Modification of Final Judgment, (2) represents that the undersigned has read such Modification of Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that non-compliance with such policy and Modification of Final Judgment will result in appropriate disciplinary measures determined by the Company and which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Modification of Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VI

Visitorial Provisions

A. For the purpose of determining or securing compliance with this Modification of Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant or after the reorganization specified in section I, a BOC, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during office hours of such defendants or BOCs to depose or interview officers, employees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, BOC,

or subsidiary companies, who may have counsel present, relating to any matters contained in this Modification of Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office or, after the reorganization specified in section I, a BOC, such defendant, or BOC, shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Modification of Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant or BOC represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, then 10 days' notice shall be given by plaintiff to such defendant or BOC prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant or BOC is not a party.

VII

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in

section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

VIII

Modifications

A. Notwithstanding the provisions of section II(D)(2), the separated BOCs shall be permitted to provide, but not manufacture, customer premises equipment.

B. Notwithstanding the provisions of section II(D)(3), the separated BOCs shall be permitted to produce, publish, and distribute printed directories which contain advertisements and which list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses.

Notwithstanding the provisions of sections I(A)(1), I(A)(2), I(A)(4), all facilities, personnel, systems, and rights to technical information owned by AT & T, its affiliates, or the BOCs which are necessary for the production, publication, and distribution of printed advertising directories shall be transferred to the separated BOCs.

C. The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

D. AT & T shall not engage in electronic publishing over its own transmission facilities. "Electronic publishing" means the provision of any information which AT & T or its affiliates has, or has caused to be, originated,

authored, compiled, collected, or edited, or in which it has a direct or indirect financial or proprietary interest, and which is disseminated to an unaffiliated person through some electronic means.

Nothing in this provision precludes AT & T from offering electronic directory services that list general product and business categories, the service or product providers under these categories, and their names, telephone numbers, and addresses; or from providing the time, weather, and such other audio services as are being offered as of the date of the entry of the decree to the geographic areas of the country receiving those services as of that date.

Upon application of AT & T, this restriction shall be removed after seven years from the date of entry of the decree, unless the Court finds that competitive conditions clearly require its extension.

E. If a separated BOC provides billing services to AT & T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT & T. There is no connection between this company and AT & T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

F. Notwithstanding the provisions of Appendix B(C)(3), whenever, as permitted by the decree, a separated BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, the tariffs filed for such less-than-equal access shall reflect the lesser cost, if any, of such access as compared to the exchange access provided AT & T.

G. Facilities and other assets which serve both AT & T and one or more BOCs shall be transferred to the separated BOCs if the use made by such BOC or BOCs predominates over that of AT & T. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

H. At the time of the transfer of ownership provided for in section I(A)(4), the separated BOCs shall have debt ratios of approximately forty-five percent (except for Pacific Telephone and Telegraph Company which shall have a debt ratio of approximately fifty percent), and the quality of the debt shall be representative of the average terms and conditions of the consolidated debt held by AT & T, its affiliates and the BOCs at that time. Upon application by a party or a BOC, the Court may grant an exception to this requirement.

I. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this decree, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

J. Notwithstanding the provisions of section I(A), the plan of reorganization shall not be implemented until approved by the Court as being consistent with the provisions and principles of the decree.

APPENDIX A

Bell Telephone Company of Nevada

Illinois Bell Telephone Company

Indiana Bell Telephone Company, Incorporated

Michigan Bell Telephone Company

New England Telephone and Telegraph Company

New Jersey Bell Telephone Company

New York Telephone Company

Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company

South Central Bell Telephone Company

Southern Bell Telephone and Telegraph Company

Southwestern Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

The Diamond State Telephone Company

The Mountain States Telephone and Telegraph Company

The Ohio Bell Telephone Company

The Pacific Telephone and Telegraph Company

Wisconsin Telephone Company

APPENDIX B

PHASED-IN BOC PROVISION OF EQUAL EXCHANGE ACCESS

A. 1. As part of its obligation to provide nondiscriminatory access to interexchange carriers, no later than September 1, 1984, each BOC shall begin to offer to all interexchange carriers exchange access on an unbundled, tariffed basis, that is equal in type and quality to that provided for the interexchange telecommunications services of AT & T and its affiliates. No later than September 1, 1985, such equal access shall be offered through end offices of each BOC serving at least one-third of that BOC's exchange access lines and, upon bona fide request, every end office shall offer such access by September 1, 1986. Nothing in this Modification of Final Judgment shall be construed to permit a BOC to refuse to provide to any interexchange carrier or information service provider, upon bona fide request, exchange or information access superior or inferior in type or quality to that provided for AT & T's interexchange services or information services at charges reflecting the reduced or increased cost of such access.

2. (i) Notwithstanding paragraph (1), in those instances in which a BOC is providing exchange access for Message Telecommunications Service on the effective date of this Modification of Final Judgment through access codes that do not permit the designation of more than one interexchange carrier, then, in accordance with the schedule set out in paragraph (1), exchange access for additional carriers shall be provided through access codes containing the minimum number of digits necessary at the time access is sought to permit nationwide, multiple carrier designation for the number of interexchange carriers reasonably expected to require such designation in the immediate future.

(ii) Each BOC shall, in accordance with the schedule set out in paragraph (1), offer as a tariffed service ex-

change access that permits each subscriber automatically to route, without the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation.

(iii) At such time as the national numbering area (area code) plan is revised to require the use of additional digits, each BOC shall provide exchange access to every interexchange carrier, including AT & T, through a uniform number of digits.

3. Notwithstanding paragraphs (1) and (2), with respect to access provided through an end office employing switches technologically antecedent to electronic, stored program control switches or those offices served by switches that characteristically serve fewer than 10,000 access lines, a BOC may not be required to provide equal access through a switch if, upon complaint being made to the Court, the BOC carries the burden of showing that for particular categories of services such access is not physically feasible except at costs that clearly outweigh potential benefits to users of telecommunications services. Any such denial of access under the preceding sentence shall be for the minimum divergence in access necessary, and for the minimum time necessary, to achieve such feasibility.

B. 1. The BOCs are ordered and directed to file, to become effective on the effective date of the reorganization described in paragraph I(A)(4), tariffs for the provision of exchange access including the provision by each BOC of exchange access for AT & T's interexchange telecommunications. Such tariffs shall provide unbundled schedules of charges for exchange access and shall not discriminate against any carrier or other customer. Such tariffs shall replace the division of revenues process used to allocate revenues to a BOC for exchange access provided for the interexchange telecommunications of BOCs or AT & T.

2. Each tariff for exchange access shall be filed on an unbundled basis specifying each type of service, element by element, and no tariff shall require an interexchange carrier to pay for types of exchange access that it does not utilize. The charges for each type of exchange access shall be cost justified and any differences in charges to carriers shall be cost justified on the basis of differences in services provided.

3. Notwithstanding the requirements of paragraph (2), from the date of reorganization specified in section I until September 1, 1991, the charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, or within reasonable subzones of an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers; provided, that the facilities of any interexchange carrier within five miles of an AT & T class 4 switch shall, with respect to end offices served by such class 4 switch, be considered to be in the same subzone as such class 4 switch.

4. Each BOC offering exchange access as part of a joint or through service shall offer to make exchange access available to all interexchange carriers on the same terms and conditions, and at the same charges, as are provided as part of a joint or through service, and no payment or consideration of any kind shall be retained by the BOC for the provision of exchange access under such joint or through service other than through tariffs filed pursuant to this paragraph.

C. 1. Nothing in this Modification of Final Judgment shall be construed to require a BOC to allow joint ownership or use of its switches, or to require a BOC to allow co-location in its building of the equipment of other carriers. When a BOC uses facilities that (i) are employed to provide exchange telecommunications or exchange access or both, and (ii) are also used for the transmission

or switching of interexchange telecommunications, then the costs of such latter use shall be allocated to the interexchange use and shall be excluded from the costs underlying the determination of charges for either of the former uses.

2. Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any such billing shall be included in its tariffed access charges to that interexchange carrier.

3. Whenever, as permitted by this Modification of Final Judgment, a BOC fails to offer exchange access to an interexchange carrier that is equal in type and quality to that provided for the interexchange traffic of AT & T, nothing in this Modification of Final Judgment shall prohibit the BOC from collecting reduced charges for such less-than-equal exchange access to reflect the lesser value of such exchange access to the interexchange carrier and its customers compared to the exchange access provided AT & T.

APPENDIX E

CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, in any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708.)

§ 16. Judgments

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by

or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 45 of this title which could rise to a claim for relief under the antitrust laws.

(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless

otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief, to be obtained thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for the consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.